

Tearing Apart at the Seams

**How Widespread Use of Fixed-Duration Contracts
Threatens Cambodian Workers and
the Cambodian Garment Industry**

**Allard K. Lowenstein International Human Rights Clinic
Yale Law School
April 2011**

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Acknowledgements

This report was drafted by Isabel Bussarakum, Clark Gard, and Arthur Plews, student members of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School. The project was supervised by Professor Michael Wishnie and Professor James Silk. DeLisa Lay, also a student in the Lowenstein Clinic, provided research and logistical support. The findings in this report are based on research conducted in Cambodia during March 2009, including interviews with government officials, garment manufacturers, factory management, labor unions, international organizations, NGOs, and various labor experts. It is also based on individual interviews with 45 factory workers, who had work experience spanning 15 different garment factories. Some interviewees consented to the use of their names and are cited in the report by name. However, to protect the anonymity and safety of other interviewees, the report refers to them only by generic titles.

The authors would like to thank Yale Law School for its generosity in funding this project and for its longstanding commitment to the Allard K. Lowenstein International Human Rights Clinic.

This report would not have been possible without the openness and hospitality of the Cambodian government, in particular Seng Sakda of the Ministry of Labor and Vocational Training.

The authors would like to credit the Worker Rights Consortium (“WRC”) for suggesting that a report on short-term contracts in the Cambodian garment industry would be useful to the Cambodian government, garment manufacturers, international buyers, and workers. The Clinic is grateful to the WRC for the guidance and assistance it has provided the Clinic during this project.

Finally, the authors thank the following organizations and individuals for sharing their time and wisdom with the Clinic team: Kaing Monika and the Garment Manufacturers Association in Cambodia (“GMAC”); Albert Tan, Regional Vice-President of Ocean Sky; Chu Man Pun, General Manager, and Ravind Takan, Quality Assurance & Compliance Officer, of Grandtex; Thoeun Kong, Compliance Officer of SL Cambodia; Lean Chinda; the Arbitration Council Foundation; the ILO Better Factories Cambodia program; the ILO Dispute Resolution Project; the ILO Worker Education Project; the U.S. Embassy in Cambodia; the Community Legal Education Center (“CLEC”); Voice of Workers; Womyn’s Agenda for Change; the American Center for International Labor Solidarity; the Cambodian Labour Union Federation

(“CLUF”); the Coalition of Cambodian Apparel Workers’ Democratic Union (“C.CAWDU”); the Cambodian Federation of Independent Trade Unions (“CFITU”); the Free Trade Union of Workers of the Kingdom of Cambodia (“FTUWKC”); the Cambodian Confederation of Trade Unions (“CCTU”); the Cambodian National Labour Confederation (“CNC”); the Cambodian National Federation of Building and Wood Workers (“CNFBW”); the Cambodian Industry Food Union Federation (“CIFUF”); and the Cambodian Tourism and Service Workers Federation (“CTSWF”).

While the Clinic is grateful to all of the individuals and organizations listed above, the conclusions drawn in this report and the recommendations this report makes represent the independent analysis of the Clinic, based solely on its own research and fieldwork in Cambodia.

List of Acronyms

AC	Arbitration Council
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
BSR	Business for Social Responsibility
CBA	Collective Bargaining Agreement
C.CAWDU	Coalition of Cambodian Apparel Workers Democratic Union
CCTU	Cambodian Confederation of Trade Unions
CFITU	Cambodian Federation of Independent Trade Unions
CLEC	Community Legal Education Center
CLUF	Cambodian Labour Union Federation
CNC	Cambodian National Labour Confederation
CNFBW	Cambodian National Federation of Building and Wood Workers
CTSWF	Cambodian Tourism and Service Workers Federation
FDC	Fixed-Duration Contract
FTUWKC	Free Trade Union of the Workers of the Kingdom of Cambodia
GIPC	Garment Industry Productivity Center
GMAC	Garment Manufacturers Association in Cambodia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ILO-BFC	International Labour Organization Better Factories Program
ILO-WEP	International Labour Organization Worker Education Project
ILO-DRP	International Labour Organization Dispute Resolution Project
ITGLWF	International Textile, Garment & Leather Worker Federation
MRS	Most Representative Status
UDC	Undetermined-Duration Contract
UDHR	Universal Declaration of Human Rights
WAC	Womyn's Agenda for Change

I. Summary

Over the past several years, the Cambodian garment industry has undergone a radical transformation in the composition of its labor force. During the mid-1990s, when the Cambodian garment industry experienced its initial boom, the majority of workers were hired on a permanent basis under what Cambodian law calls “undetermined-duration contracts” (“UDCs”). Now, factories hire new workers almost exclusively under short-term, temporary contracts, referred to in Cambodia as “fixed-duration contracts” (“FDCs”), and many workers originally hired under UDCs have faced pressure to convert their permanent contracts to FDCs.

The move by Cambodian garment manufacturers to employ a regular, full-time workforce almost exclusively on short-term contracts has sparked a debate in Cambodia over the impact of the increased use of FDCs on workers’ rights and the role FDCs play in keeping the Cambodian garment industry competitive. At the center of this debate is the question of whether the move to FDCs in the name of competitive, flexible business threatens the main competitive advantage of the Cambodian garment industry over its lower-cost competitors: its reputation for being relatively more protective of workers’ rights and, therefore, more attractive to responsible international brands.

This debate has intensified over the last two years, as the Cambodian government considers an amendment to the Labor Law that would ease restrictions on the use of FDCs. The amendment has triggered different responses from garment manufacturers, NGOs, labor unions, and international buyers (the companies that contract with garment factories to produce apparel), all of which have weighed in on the issue of FDCs.

This report considers, from a range of perspectives, the proper role of FDCs in the Cambodian garment industry. In drafting this report, the Clinic has sought to avoid reducing the debate over FDCs into a black-and-white, zero-sum debate between employers and workers. Based on its interviews with stakeholders on different sides of the issue, the Clinic believes that the Cambodian government, garment manufacturers, factory workers, and labor unions all share the common goal of seeing the Cambodian garment industry thrive. Additionally, all recognize that making significant progress in protecting workers’ rights has given Cambodia’s garment industry much of its strength and competitive advantage in the global market. Although the stakeholders involved share the goal of keeping the Cambodian garment industry healthy and competitive, they disagree over the role that FDCs should play in achieving that goal.

Keeping in mind the link between a competitive garment industry and Cambodia's reputation for progress in the domain of workers' rights, this report analyzes the effects of the increased use of FDCs on Cambodian workers' rights, under both domestic and international law. It then considers how the increased use of short-term contracts might ultimately affect the competitiveness of the Cambodian garment industry.

The results of the Clinic's analysis in this report are clear. The shift toward FDCs: (1) results in increased worker insecurity; (2) threatens the enforcement of workers' rights under domestic and international law; (3) presents obstacles to increased labor productivity; (4) jeopardizes Cambodia's reputation as a country committed to improving conditions for workers; and (5) increases the threat of a major breakdown of industrial relations and creates a potential provocation for massive strikes. This concern has become more salient since a four-day nationwide strike in the garment industry in September 2010 revealed the fragility of the sector's labor relations environment.

In the Clinic's view, the competitiveness of the Cambodian garment industry and the seriousness with which the Cambodian government approaches its domestic and international legal obligations to uphold workers' rights must be viewed as inextricably linked: Cambodia's principal competitive advantage over lower-cost competitors like China is its reputation for protecting workers' rights. This report, therefore, considers the impact of FDCs on both workers' rights and the competitiveness of the Cambodian garment industry. It also provides recommendations to industry stakeholders about how to ensure that Cambodia's reputation, workers, and economy are not harmed by the unchecked use of FDCs. The report's recommendations present an opportunity for the Cambodian government, garment manufacturers, workers, and unions to work in collaboration toward the common goal of a healthy and competitive garment industry.

II. Recommendations

The widespread use of FDCs in the Cambodian garment industry harms workers' rights and threatens to destroy Cambodia's reputation – its main competitive advantage over lower-cost competitors. As this report explains, the widespread use of FDCs violates domestic and international law, poses a challenge to collective bargaining and peaceful industrial relations, and limits the competitiveness of the garment industry by discouraging the development of a Khmer¹ middle-management base.

To help keep the Cambodian garment industry competitive, protect workers' rights, and ensure that Cambodia does not harm its reputation by violating domestic and international labor law, the Clinic makes the following recommendations:

Cambodian Government

To provide immediate assurance that any amendments or other reforms to the Labor Law do not harm the interests of workers or damage the reputation of the Cambodian garment industry, the Cambodian government should immediately:

1. Remove consideration of the proposal to amend Articles 67 and 73 of the Labor Law;
2. Issue a statement affirming the Arbitration Council's finding, in *Jacqsintex*, that Article 67 of the Labor Law imposes a cumulative two-year cap on the use of FDCs; and
3. Expand tripartite talks to include interested buyers and labor NGOs and halt further tripartite talks until the International Labour Organization ("ILO") is present as a neutral mediator.

To better achieve compliance with domestic and international law, secure industrial peace, and protect Cambodia's competitive advantage in the area of workers' rights, the Cambodian government should:

4. Limit the number of times an FDC may be renewed before it is converted to a UDC; and
5. Require that all FDCs have a duration of not less than a government-set minimum length of time.

To protect FDC workers against discrimination, improper discharge, and deprivation of rights, the Cambodian government should:

6. Require that non-renewal of FDCs be for a valid, business-related reason;

¹ "Khmer" refers to both the Cambodian language and the predominant ethnic group in Cambodia.

7. Issue a ministerial decision (“prakas”) specifying that seniority and length of continuous employment for the purpose of calculating statutory benefits, including paid maternity leave and seniority bonuses, accrue from the date of initial employment and are not reset each time an FDC is renewed; and
8. Require Labor Inspectors not to approve the internal work rules of any factory that treats FDC and UDC workers unequally in terms of eligibility for benefits and accrual of seniority.

To protect workers from improper factory shutdowns, the Cambodian government should:

9. Require that all factories, upon closing, receive a certificate from the Labor Inspector, certifying that the closing complied with the Labor Law;
10. Refuse to grant the requisite permits to open a new factory to any employer who was found to have previously shut down a factory without complying with the Labor Law and without receiving the relevant Labor Inspector’s certification of proper shutdown; and
11. Establish a system, such as requiring factories to pay into escrow accounts, that can be used to pool the risk of illegal factory shutdowns and compensate workers who are victims of factories that close without paying proper benefits.

To target sources of inefficiency and increased production costs in the garment industry, the Cambodian government should:

12. Institute robust anti-corruption reform; and
13. Create a more reliable basic infrastructure for manufacturing, including more reliable and affordable electricity for factories.

International Buyers

To give factories incentives to respect the rights of all workers and to further industrial peace, international buyers should:

1. Declare in writing to the Cambodian government and to all factories in Cambodia from which they source, their disapproval of amendments to the Labor Law that would relax restrictions on the use of FDCs;
2. Ensure that sourcing and compliance departments work together to award contracts not just to the lowest-cost producers, but to the lowest-cost rights-friendly producers;

3. Require factories to report on the composition of their workforces and to ensure that their regular workforces (i.e., all workers who are not seasonal, temporary, or casual) are employed on UDCs;
4. Require factories to take steps to establish internal rules that specifically provide equal access to benefits, including accrual of seniority, for FDC workers; and
5. Require factories to comply with the Arbitration Council's interpretation of the Labor Law as imposing a cumulative two-year cap on FDCs.

Garment Manufacturers Association of Cambodia

To ensure that its member factories promote the good reputation of the Cambodian garment industry, respect domestic and international law, and not miscategorize permanent workers as FDC workers, the Garment Manufacturers Association of Cambodia ("GMAC") should:

1. Require, as a criterion for GMAC membership, that factories not have more than a fixed percentage of their workforces on FDCs, with the percentage fixed by the GMAC in consultation with the ILO and labor NGOs;
2. Publish a "best practices" manual, in collaboration with the ILO and other stakeholders, that explains the proper provision of benefits and accrual of seniority for FDC workers;
3. Suspend membership in the GMAC of all companies found to have engaged in factory closings that do not comply with the Labor Law; and
4. Disqualify managers of factories found by the Arbitration Council to have engaged in anti-union discrimination from holding positions on GMAC's Board of Directors, even if such a finding was made as part of a non-binding award.

Arbitration Council

To ensure that the Arbitration Council provides an effective means for workers to adjudicate disputes relating to denial of benefits and anti-union discrimination, the Arbitration Council should:

1. Establish a standard for a prima facie showing of improper termination, including termination due to anti-union discrimination, that, when satisfied by a petitioning worker, would create a presumption of improper termination and shift the burden of proving proper termination onto the employer;

2. Require that the employer demonstrate proper grounds for termination where the record indicates that the employer immediately replaced a non-renewed FDC worker with another FDC worker, or that the non-renewal was not motivated by a legitimate business reason (in order to effectively treat cases of FDC non-renewal as equivalent to cases of UDC termination); and
3. Require, as a condition of enforcing a contract during arbitration, evidence that the workers entered freely into the contract with full knowledge of the meaning of the terms to which they agreed.

ILO-Better Factories Cambodia

To better track the widespread use of FDCs to deprive workers of their rights under the Labor Law and to distinguish between legitimate and illegitimate FDC non-renewal, the ILO should:

1. Investigate whether employers subsequently filled non-renewed FDC workers' positions with other FDC workers;
2. Investigate whether a factory that declines to renew FDCs was experiencing a decreased volume of orders at the time of non-renewal or had another legitimate business reason for non-renewal; and
3. Investigate whether the timing of any non-renewal raises suspicion of illegal termination, particularly for non-renewal immediately following union election or pregnancy.

United States Government and Other Major Trade Partners

To encourage responsible production and strengthen protections for freedom of association and other key workers' rights, the United States and other major trading partners should:

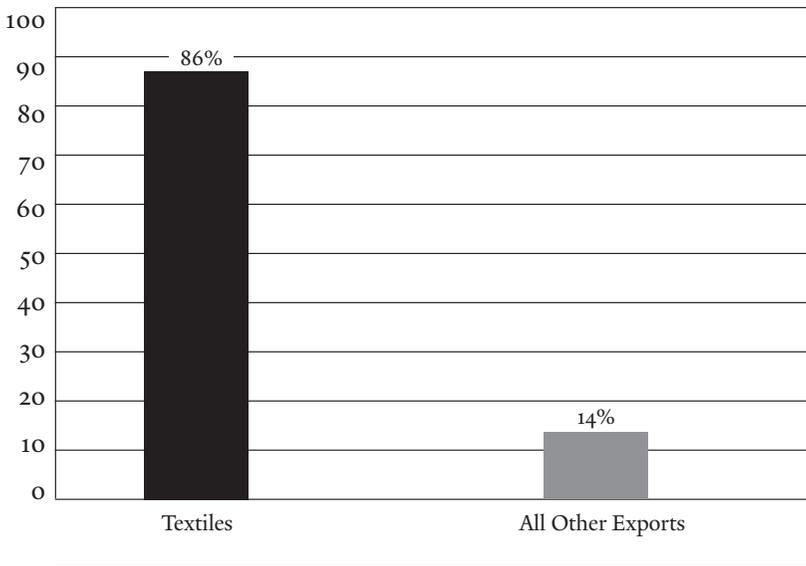
1. Recognize in all trade-related discussions with Cambodia that genuine respect for internationally accepted labor standards is a precondition for increased commercial linkages and access to global markets; and
2. Condemn publicly – through statements issued from the highest levels of government – intimidation, threats, and violence against Cambodian labor activists who speak with foreign governments about issues that are relevant to Cambodia's major trade partners and international buyers.

III. How Changes in the Garment Industry Have Affected Cambodian Workers

A. The Modern Cambodian Garment Industry

Cambodia's emergence as an important garment exporter has been achieved as a result of rapid growth in the garment manufacturing industry over the past decade. The industry was almost non-existent up to the mid-1990s but now accounts for around 45% of all workers employed in manufacturing nationwide.² A critical part of Cambodia's economy, the garment industry accounts for more than 80% of the country's total exports³ and around 16% of its entire Gross Domestic Product.⁴ The global economic crisis took a

Cambodian Total Exports by Sector, 2009



Source: Cambodian Ministry of Economy and Finance, *Monthly Bulletin of Statistics*, Vol. 15 No. 170 (February 2010)

² *Cambodia's Garment Industry Has Evolved to Become the Country's Most Important Manufacturing Sector*, Reuters, May 9, 2008, available at <http://www.reuters.com/article/pressRelease/idUS110979+09-May-2008+BW20080509>.

³ Ministry of Economy and Finance, *Monthly Bulletin of Statistics*, Vol. 15 No. 170 (Feb. 2010), available at http://www.mef.gov.kh/documents/shares/publication/bulletin/170_bulletin_february_2010.pdf.

⁴ World Bank, *Sustaining Rapid Growth in a Challenging Environment*, p. 8 (Feb. 2009), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,,contentMDK:22045032~pagePK:1497618~piPK:217854~theSitePK:293856,00.html>

toll on Cambodian garment exports in 2008 and 2009, largely as a result of a decline in global demand for manufactured goods that was particularly acute in the United States and the European Union, two of Cambodia's biggest markets for garment exports. Because of its significance to the overall health of the Cambodian economy, the recovery of the Cambodian garment industry from the global economic crisis has been a high priority for the Cambodian government. This makes it particularly important at this time to carefully consider the link between Cambodia's reputation for providing a rights-friendly business environment and the competitiveness of the Cambodian garment industry.

The face of the Cambodian garment worker is that of a young, rural female.

The face of the Cambodian garment worker is that of a young, rural female. More than 90% of the workers in the Cambodian garment industry are women, which is unique in a country where men dominate the rest of the non-agricultural labor market.⁵ The majority of these women are from the country's rural areas and have no more than a primary school education.⁶ They come to the factories around Phnom Penh and in other areas for the promise of a higher wage in the one industry in which women predominate. With little mobility and a dearth of other economic options, these women are especially vulnerable to pressure from their employers.

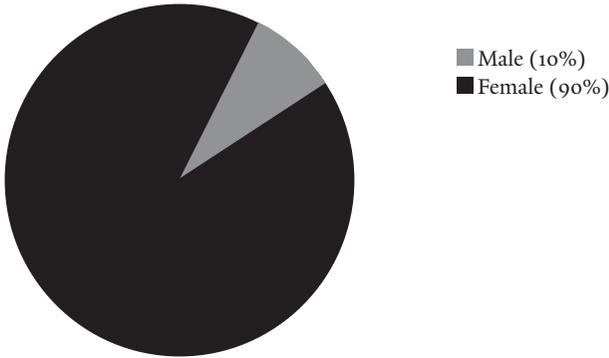
B. Cambodia's Emergence as a Leader in Workers' Rights

Cambodia stands out among garment-exporting countries for the commitment its government and other stakeholders have shown to improving conditions for factory workers. Beginning in the late 1990s, the Cambodian government demonstrated a greater commitment than many of its competitors to workers' rights. To gain a competitive advantage over lower-cost competitors that have less positive records of enforcing labor standards, Cambodia has attempted to project a worker-friendly image to western buyers. Cambodia's 1997 Labor Law defines the rights available to workers, and the 1999 U.S.-Cambodia Bilateral Textile Trade Agreement ("Bilateral Trade

⁵ World Bank, *Garment Sector Competes and Thrives in Cambodia* (Aug. 5, 2007), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,,contentMDK:21431943~menuPK:293861~pagePK:2865066~piPK:2865079~theSitePK:293856,00.html>; see also Better Factories Cambodia, *Facts and Figures about Cambodia's Garment Industry* (Feb. 2005), available at <http://www.betterfactories.org/ILO/aboutIndustry.aspx?z=3&c=1>.

⁶ Better Factories Cambodia, *Facts and Figures about Cambodia's Garment Industry* (2005).

Gender Breakdown of Cambodian Garment Workers (estimated)



Source: World Bank, *Garment Sector Competes and Thrives in Cambodia* (Aug. 5, 2007)

Agreement”) established a system for monitoring the enforcement of those rights. Working in tandem, the Labor Law and the Bilateral Trade Agreement helped forge a system of labor protection and factory monitoring that remains largely in place today.

The 1997 Labor Law is progressive in the array of rights it recognizes for Cambodian workers. In 1999, when the Clinton administration negotiated the Bilateral Trade Agreement with the Cambodian government, labor groups in the United States pressed for incorporation of both international labor standards and the rights articulated in the 1997 Labor Law into the Agreement as a means of promoting their enforcement.⁷ The agreement, concluded on January 20, 1999, provided an incentive for Cambodian compliance with international and domestic labor regulations by tying the country’s access to U.S. markets to its compliance with those standards. In exchange for an export quota – the right to export a limited number of textiles to the United States – Cambodia agreed to submit to an extensive labor inspection program coordinated by the International Labour Organization (“ILO”). The Agreement provided for increases in the export quota if Cambodian factories made satisfactory progress in improving working conditions. Thus, when the Bilateral Trade Agreement entered into force, Cambodia had

⁷ Kevin Kolben, *Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories*, 7 *Yale Hum. Rts. & Dev. L.J.* 79, 90 (2004).

a progressive labor law, a strong economic incentive to enforce it, and help from the ILO to facilitate compliance.

The reputational gains that Cambodia achieved with this system helped Cambodia's garment industry get off the ground and turned the country into a major garment exporter over the next decade. The Bilateral Trade Agreement lapsed in early 2005, just after Cambodia became a full member of the World Trade Organization ("WTO").⁸ By this point, however, a number of institutional actors had emerged as the major players in shaping Cambodian industrial relations, working to guarantee both the competitiveness of the Cambodian garment industry and its reputation as a country committed to improving conditions for workers. These major players remain the key stakeholders in the Cambodian garment industry, and the next section (III.C) of this report briefly considers each stakeholder's specific role in the industry's operations.

C. Key Institutional Actors in the Garment Industry

1. Ministry of Labor and Vocational Training

The Ministry of Labor and Vocational Training ("Ministry of Labor") is responsible for enforcing the 1997 Labor Law and supervising all labor issues in Cambodia. The Ministry is tasked with developing and implementing the protections for workers mandated by the Labor Law and ensuring Cambodia's compliance with both domestic and international law relating to workers' rights.⁹ Some current Ministry of Labor officials were responsible for drafting the 1997 Labor Law, but there is now internal dissent within the Ministry as to the Law's proper interpretation. The Clinic spoke with Ministry of Labor officials who have continued to speak out in favor of strong protections for workers, but there are other officials who have been criticized by labor unions and activists as beholden to the interests of garment manufacturers.

2. The Arbitration Council

The Arbitration Council ("AC") is the primary mechanism for adjudicating disputes arising under the 1997 Labor Law. The Labor Law mandated the creation of an arbitration council to resolve disputes that could not be solved through the conciliation process outlined in the Law,¹⁰ but the AC

⁸ Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labour Regimes*, 48 Harv. Int'l L.J. 203, 240 (2007).

⁹ Anukret No. 87, *The Organization and Functioning of the Ministry of Social Affairs, Labor, Vocational Training and Youthful Rehabilitation*, Aug. 6, 1999, arts. 19 & 20.

¹⁰ Cambodia Labor Law, arts. 309-317.

did not formally come into existence until 2003.¹¹ It is comprised of members chosen by three constituencies: one third by the government, one third by labor unions, and one third by manufacturers. The AC hears only collective disputes. Its decisions can be either binding or non-binding,¹² depending upon what the parties agree to in advance. With its tripartite structure and a reputation for efficient decision-making, the AC has emerged as a key standard-setter in the interpretation and application of the Labor Law. Its decisions over the past six years form a body of labor law jurisprudence that is of particular importance to the debate surrounding the proper use of FDCs under the Cambodian Labor Law, even while some garment manufacturers and government officials criticize the Arbitration Council as being overly influenced by the international technical assistance it receives.

3. International Labour Organization Better Factories Cambodia Program

The ILO established the “Better Factories Cambodia” program (“ILO-BFC”) to monitor compliance with the U.S.-Cambodia Bilateral Trade Agreement. Although ILO-BFC is an ILO entity, its funding comes from the U.S., French, and Cambodian governments, as well as Cambodian garment manufacturers and the international clothing companies they supply.¹³ It is run partially by ILO staff but operates in consultation with garment manufacturers, the Cambodian government, and labor unions. ILO-BFC is in the process of becoming a Cambodian-controlled and fully self-sufficient public-private partnership.¹⁴ The program focuses mainly on monitoring factories and working with manufacturers and the Cambodian government to meet international labor standards. It generates reports on factory conditions based on its monitoring activities, which are made available to international buyers for a fee.¹⁵ When placing their orders, buyers look to the ILO-BFC reports on candidate factories to determine whether a particular factory is compliant with

¹¹ Prakas No. 338, *The Arbitration Council*, Dec. 11, 2002, established the AC. A prakas is a ministerial decision interpreting a law or sub-decree.

¹² If the parties agree to a *binding* AC decision and one of the parties later violates the terms of that decision, then the other party can file a complaint in the regular court system to enforce the AC decision. If the parties agree to a *non-binding* AC decision and one of the parties later violates the terms of that decision, the other party can similarly file a complaint in the regular court system; however, where the AC decision is non-binding, the regular Cambodian court reviews the case again and issues a new decision, which is enforceable.

¹³ Better Factories Cambodia, *About Better Factories*, <http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1> (last visited Dec. 6, 2009).

¹⁴ *Ibid*; see also Lowenstein Clinic Interview with a labor law consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁵ *Ibid*.

international labor standards, making ILO-BFC one of the most important actors in the Cambodian garment industry.

4. Garment Manufacturers Association in Cambodia

The mostly foreign¹⁶ companies that own and operate Cambodia's garment factories represent a significant political force in Cambodia. The Garment Manufacturers Association in Cambodia ("GMAC") was founded in 1996 to advance the collective agenda of garment manufacturers operating in Cambodia. It aggressively lobbies the Cambodian government to take pro-manufacturer positions on issues ranging from taxation to international trade policy and the interpretation of the Labor Law. With more than 300 companies making up its membership, the GMAC is the most important voice representing Cambodian garment manufacturers.

The GMAC has played a particularly significant role in the debate over FDCs. It is the driving force behind the proposal to amend the Labor Law to allow more liberal use of FDCs. The GMAC's representative takes the stance that unrestricted renewals of FDCs will be economically advantageous to its membership. According to the GMAC's position, current Cambodian law on the matter is unclear, and it supports the government's proposal to amend the 1997 Labor Law to authorize the practice of indefinite renewal of short-term employment contracts.

5. International Buyers

International buyers, the companies that contract with garment factories to produce apparel, occupy a highly influential place in the debate over Cambodian labor policy. Companies that purchase garments from Cambodian factories include such major corporations as Gap, Levi Strauss, and Wal-Mart. Since the expiration of the Bilateral Trade Agreement, the only powerful economic incentive for the Cambodian government to require factories to uphold a high standard of protection for workers rests with these international buyers. Because of corruption, high energy costs, and a lack of cheap, domestically produced raw materials, Cambodian factories have higher production costs than competitor factories operating in other countries. Higher production costs mean that it can be more expensive for international buyers to purchase – or "source" in the language of the industry – from Cam-

¹⁶ The majority of garment companies operating in Cambodia are controlled by ethnic Chinese business interests based in various countries across Asia. *Understanding the Impact of the Global Economic Crisis on the Cambodian Garment Sector: A Survey Conducted by CAMFEBA and BDLINK (Cambodia) Co., Ltd*, Final Report, Apr. 2010, <http://www.betterfactories.org/resource/assetdet.aspx?z=7&idoc=127&c=1>.

bodian factories, which is why the health of the Cambodian garment industry depends on international buyers looking at more than just the bottom line. Buyers are important to efforts to protect workers' rights in the Cambodian garment industry, both because they help fund the ILO-BFC's monitoring and training programs through the fees they pay to the ILO-BFC for its factory reports and because of the immediate attention they receive from garment manufacturers when they take a strong position on a labor issue. Because international buyers have the ear of both the Cambodian government and the GMAC, it is critical to the struggle for workers' rights in Cambodia that labor unions, NGOs, and workers themselves communicate and work with these buyers.

6. Labor Unions

Cambodia's garment industry developed hand-in-hand with international monitoring of labor rights. This contributed to an explosion of union activity. Countless unions have sprung up, merged, split, and organized themselves into a variety of union federations. Their numbers, however, belie the difficulties they face in representing their membership.

Although freedom of association is protected by the Cambodian Constitution and Labor Law and is one of the key areas that the ILO-BFC evaluates, labor unions operate within a complex and treacherous terrain in Cambodia. Recent history has shown that those who speak out against labor conditions in Cambodia may do so at their own peril. Violence against union leaders, exemplified by the assassinations of Hy Vuthy on February 24, 2007, Chea Vichea on January 22, 2004, and others, has had a significant chilling effect on union activism.

There are independent unions in Cambodia that devote themselves to worker advocacy and that do so free from government or manufacturer influence, but there are also a number of "yellow unions," unions that receive financial support from the government or employers for advocating positions that subordinate worker concerns to the desires of manufacturers. Despite these challenges, the independent unions have been surprisingly unified in speaking out against the widespread use of FDCs and the impact that FDCs have on freedom of association.

7. Government-Private Sector Forum Working Group on Industrial Relations

The Government-Private Sector Forum Working Group on Industrial Relations, popularly known as the Eighth Working Group, brings together representatives from the Cambodian government, the GMAC, labor unions, and international organizations to discuss industrial relations policy. It makes recommendations to the Cambodian government about how to proceed on matters that include the proposed amendment to the Labor Law. According to its website, the Eighth Working Group's meetings "are formal Cabinet meetings and decisions made in the Forums are binding."¹⁷ The draft Labor Law amendment to ease restrictions on FDCs was the top agenda item in the March 5, 2009, meeting of the Eighth Working Group. At that meeting, the private sector (GMAC) voiced strong approval for the amendment and encouraged the Cambodian government to adopt it as soon as possible. The Eighth Working Group decided that, despite opposition to the amendment from labor unions and international buyers, the Ministry of Labor would not abandon it. At the same meeting, the co-chair of the Eighth Working Group asked the Ministry of Labor to create a special task force within the Working Group to further consider the amendment. The task force would include members of the Cambodian government, the GMAC, and three or four trade unions, and the ILO would moderate the talks.¹⁸

D. The Turn Toward FDCs Undermines the Protection of Workers

When the Cambodian garment industry was first developing, factories generally hired workers by oral agreement, and written contracts were rare. According to Article 67 of the Labor Law, unwritten contracts are classified as UDCs by default. Around 2005 and 2006, factories began to move away from UDCs and started to employ more and more workers on FDCs. Based on the evidence that the Clinic gathered in interviews with the GMAC, factory managers, workers, and labor unions, it appears that the shift from UDCs to FDCs did not coincide with a decrease in the number of full-time, regular factory workers. The shift from UDCs to FDCs signaled a change in worker categorization, not worker utilization. Employers have been able to build permanent workforces using temporary contracts by repeatedly renewing workers' FDCs when they expire. In many cases, factories are using re-

¹⁷ About G-PSE, Cambodia Government-Private Sector Forum, <http://www.cambodia-gpsf.org/about.aspx?x=1&c=1> (last visited Aug. 9, 2010).

¹⁸ At the time of publication, this special task force within the Eighth Working Group had not yet been created.

peatedly renewed FDCs to employ the same employees they once maintained on UDCs.

The distinction between worker categorization and worker utilization is at the heart of the legal and policy debates over whether widespread use of FDCs in the Cambodian garment industry is proper under the law and consistent with Cambodia's commitments to workers' rights. The question of the proper use of FDCs in the Cambodian garment industry is particularly critical at this moment because the Cambodian government is considering an amendment to the Labor Law that would relax restrictions on the use of FDCs.

In February 2009, the Cambodian government proposed an amendment to Articles 67 and 73 of the 1997 Labor Law. Article 67 addresses employment contracts and states about FDCs: "The labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as *the renewal* does not surpass the maximum duration of two years."¹⁹ The government issued a Draft Amendment replacing "the renewal" with "each renewal,"²⁰ a change that would give employers clear legal authority to keep permanent, full-time workers classified as FDC workers indefinitely, as long as they hire them under successively renewed FDCs having durations of two years or less.

The widespread shift from UDCs to FDCs has resulted in tremendous worker insecurity, heightened antagonism between unions and factory management, and a threat to peaceful industrial relations. The nationwide strike in the garment industry in September 2010 was a powerful reminder of the presence of this threat. Many workers – both newly recruited and already employed – feel as though they have no choice in switching to FDCs and are dissatisfied and anxious about the shift. Although many workers interviewed by the Clinic said that they keep

The widespread shift from UDSs to FDCs has resulted in tremendous worker insecurity, heightened antagonism between unions and factory management, and a threat to peaceful industrial relations.

¹⁹ Cambodia Labor Law, art. 67 (emphasis added).

²⁰ Draft Amendment on art. 67, point 2 & art. 73, paras. 5 & 6 of Cambodia Labor Law. Article 73, which deals with termination of the labor contract, would be modified only to be made consistent with amended Article 67.

quiet out of fear of management retaliation, they also described numerous instances of resistance, both individual and collective, to the shift to FDCs. Some workers simply refused to sign new contracts that would replace their UDCs with FDCs. Many of them were terminated or continually suspended or faced other forms of harassment until they eventually left the factory. Other interviewees told the Clinic that, in some factories, workers attempted to go on strike in response to conversions to FDCs, but unfortunately, factories responded by simply hiring new workers and converting older workers' contracts to FDCs. Some of the workers, with the help of labor unions, have also filed complaints with the Ministry of Labor and brought cases to the Arbitration Council, arguing that conversions of existing UDCs to FDCs were illegal.²¹

The interpretation of Article 67 has been the subject of considerable controversy, as this report describes in greater detail below. The Cambodian government's draft proposal to amend the Labor Law has outraged labor unions and drawn criticism from international buyers and NGOs. In response to these negative reactions, the Eighth Working Group asked the Ministry of Labor to create a tripartite task force (mentioned above in Sub-section III.C.7) to discuss the proposed amendment.

The strength of the Cambodian garment industry, the health of the Cambodian economy, and the dignity of Cambodian garment workers all depend on the government, Cambodia's trading partners, garment manufacturers, labor unions, NGOs, and international buyers working together to address the issue of FDC regulation. The Clinic hopes that the legal and policy analysis that follows, as well as the recommendations at the beginning of the report, will be useful to all stakeholders involved as they come together to address this important issue.

²¹ See generally Part VI of this report, detailing workers' various responses to the widespread shift from UDCs to FDCs.

IV. Does the Industry’s Use of FDCs Conflict with Cambodian or International Law?

This Part examines the lawfulness of the use of FDCs under domestic and international law. It begins by considering whether the widespread use of FDCs in the garment industry negatively affects workers’ rights guaranteed by Cambodian law (Section IV.A). It then considers whether the use of FDCs to constitute a permanent labor force complies with international labor standards (Section IV.B).

A. The Widespread Use of FDCs Conflicts with Cambodian Labor Law

1. Cambodian Law Applicable to the Use of FDCs

The Cambodian law that is most significant for this analysis of the regulation and use of FDCs is the Cambodian Labor Law of 1997. The Ministry of Labor and Vocational Training (“Ministry of Labor”) is responsible for enforcing the Labor Law,²² but the Arbitration Council is tasked, under Article 312, with deciding “disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement.” Awards declared by the Arbitration Council thus provide significant insight into the operation of Cambodian employment law, as it is the Council that interprets the meaning of the Labor Law and applies it to collective disputes about the issues of concern in this analysis.

The Cambodian Constitution of 1993 (“the Constitution”) is also an important source of law for this analysis. It provides Cambodian citizens the rights to freely associate, join unions, and receive social security. It also prohibits discrimination against women in employment and establishes protections for pregnant women. Other laws and sub-decrees that are relevant to this analysis include the Law on Social Security Schemes for Persons Defined by the Provisions of the Labor Law, the Law on Benefits of Occupational Risks, a sub-decree²³ on the Composition and Functioning of the Labor Advisory Commission, the Ministry of Labor’s Notification No. 017 on the Minimum Wage of Garment Workers, and Notification No. 049 on the New Minimum Wage.²⁴

²² Anukret No 87/ANKr/BK, art. 3.

²³ In Cambodian law, a sub-decree (Anukret) is a legal instrument adopted by the Council of Ministers and signed by the Prime Minister; sub-decrees are required to conform to the Constitution and to the law to which they refer.

²⁴ On July 9, 2010, the Ministry of Labor promulgated Notification No. 049 on the New Minimum Wage (“Notification No. 049”), which raises the base minimum wage for both

2. Equal Rights Unequally Enjoyed

According to Article 66 of the Cambodian Labor Law, all labor contracts are made “either for a fixed duration or for an undetermined duration.” The distinction between FDCs and UDCs is therefore built into the Labor Law, but the Law’s various protections apply equally to workers under both forms of contract, except where it explicitly delineates separate standards for different categories of work. Article 10 of the Labor Law articulates the principle of equal rights for all workers, regardless of their classification: “Casual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately.”

Understanding the differences between the rights available to workers hired under UDCs and workers hired under FDCs requires analysis of the express differences between the rights and benefits attached to each form of contract. It also requires analysis of the ways in which certain rights, despite applying equally to both types of contract under the Law, are not equally enjoyed in practice by both categories of workers. ILO-BFC monitors have found, for example, that minimum-wage regulations are significantly less well enforced for casual workers than for regular workers,²⁵ even though the minimum wage applies equally to both according to the law. Overall, the Clinic’s findings from worker interviews (detailed below) indicate that whether a worker has been hired under an FDC or a UDC can significantly affect the worker’s ability to enjoy rights in practice, even where, as a formal matter, those rights apply equally to all categories of workers.

This section focuses on distinctions between FDCs and UDCs in the Labor Law itself. Its analysis of the different rights assigned to each form of contract provides the foundation for the report’s later discussion of why even

Whether a worker has been hired under an FDC or a UDC can significantly affect the worker’s ability to enjoy rights in practice, even where, as a formal matter, those rights apply equally to all categories of workers.

probationary and non-probationary workers by \$5 per month. Notification No. 049 does not address the questions relating to annual leave, seniority bonuses, and attendance bonuses raised in this report with respect to Notification No. 017. It went into effect October 1, 2010, so the effects of its implementation could not be analyzed as of the publication date of this report.

²⁵ ILO-BFC, *Twenty First Synthesis Report*, at p. 7 (Oct. 8, 2008).

rights that apply equally – as a matter of law – to each form of contract are nevertheless enjoyed unequally by workers, depending on their classification. Of particular importance are differences between the termination provisions associated with each form of contract, which allow employers to terminate FDC workers more easily than UDC workers. This difference in ease of termination explains why various rights are not enjoyed equally by each category of worker, even though the Labor Law provides for equal protection under both forms of contract. The ease with which employers can terminate FDC workers also opens the door to anti-union discrimination. Article 37 of the Constitution guarantees every Khmer citizen the right to unionize, and Article 42 guarantees the right to freedom of association more broadly. The precariousness of FDC workers’ employment status has consequences, in practice, for a host of rights, including freedom of association, that are guaranteed by both the Labor Law and the Constitution.

3. Differences in the Ease and Cost of Terminating the Employment Relationship

FDC workers are not only guaranteed fewer rights under the Labor Law; they are also more easily deprived of the rights to which they are legally entitled, because they can be terminated more easily than workers hired under UDCs. Three aspects of the Labor Law’s treatment of each form of contract contribute to the greater ease with which employers can terminate workers hired under FDCs than workers hired under UDCs.

First, the Labor Law requires longer notice periods for termination of UDC workers and provides more benefits to UDC workers during the notice period than it does to FDC workers.²⁶

Second, the Labor Law does not require that employers justify their decision not to renew an FDC worker’s contract but does require such justification if they wish to terminate a UDC worker.²⁷

Third, the Labor Law imposes fewer financial penalties on employers who wrongfully terminate FDC workers than it does on employers who wrongfully terminate UDC workers. It also requires employers to pay UDC workers forms of compensation upon termination that it does not require them to pay to FDC workers.²⁸

²⁶ Cambodia Labor Law, art. 73 (providing notice requirements for terminating an FDC); Cambodia Labor Law, art. 75 (providing notice requirements for terminating a UDC).

²⁷ See Part IV.A.3.b of this report, discussing the difference between non-renewal of an FDC and termination of a UDC.

²⁸ Cambodia Labor Law, art. 89 (calculating indemnity for terminated workers based on continuous service, which disadvantages, or tends to disadvantage, FDC workers).

For these reasons, FDC workers experience a more precarious form of employment than do UDC workers.

a. Notice Requirements and Notice-Period Benefits

The Labor Law explicitly distinguishes between the protections it extends in the context of worker termination to workers hired under FDCs and workers hired under UDCs. The notice requirements applicable to the termination of workers under FDCs are far more relaxed than the notice requirements applicable to the termination of workers under UDCs. According to Article 73 of the Labor Law, employers must give at least ten days' notice for the termination of an FDC lasting more than six months and fifteen days for an FDC lasting longer than one year. The Labor Law does not define a minimum notice period for the termination of FDCs lasting less than six months.

In contrast, under Article 75, employers must give at least fifteen days' notice to terminate a UDC if the employee's service lasted from six months to two years, one month's notice if service lasted from two to five years, two months' notice if service lasted from five to ten years, and three months' notice if service lasted for more than ten years. Article 75 also explicitly protects workers hired under UDCs whose service lasts less than six months, by imposing a seven-day notice requirement for their termination. The section of the Labor Law dealing with termination of UDCs further stipulates that: notice periods cannot be reduced by private contract;²⁹ failure to give proper notice entitles workers hired under UDCs to all the wages and benefits they would have received during the proper notification period;³⁰ and once given notice, UDC workers are entitled to two days per week with full payment during the notice period to look for new jobs.³¹

Significant differences, therefore, between UDC and FDC workers include employers' ability to terminate workers under FDCs with less notice than workers under UDCs and the lesser notice-period benefits – when notice is given – that FDC workers receive.

b. Wrongful Termination and Non-renewal

Although the Labor Law does not explicitly apply different requirements for terminating UDC and FDC workers, two features of the fixed-duration contract make it easier for employers to end the employment

²⁹ Cambodia Labor Law, art. 76.

³⁰ Cambodia Labor Law, art. 78.

³¹ Cambodia Labor Law, art. 79.

relationship with FDC workers than with UDC workers. First, the Labor Law does not apply the same standards of review to contract non-renewal that it applies to contract termination; an employer can refuse to renew an FDC worker's contract without being subject to the requirements that apply to the termination of a UDC worker's contract. Second, because it is more difficult for short-term workers to qualify for all of the severance pay to which permanent workers are entitled, employers face fewer costs when terminating FDC workers than they do when they terminate UDC workers.

The legal requirements for terminating an FDC and a UDC are similar and strict, limiting the ability of employers to end their contracts with workers. Under Article 73 of the Labor Law, an employer may lawfully terminate an FDC prior to the expiration of the contract only if there has been "serious misconduct" by the worker or an intervening "act of god." Similarly, Article 74 provides that an employer can terminate a UDC only where the employer can provide "a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise." The Arbitration Council has interpreted Article 74 as imposing the same "serious misconduct" standard on UDCs that applies to FDCs under Article 73.³² In both cases, the employer bears the burden of proving serious misconduct.³³ According to the Arbitration Council, an employer must be able to show with "concrete evidence" that there was repeated misconduct in order for that conduct to be sufficiently serious to justify termination.³⁴

Refusing to renew an FDC, however, is not the same as terminating one. The Labor Law gives employers much greater freedom to decline to renew an FDC than it does to terminate either type of contract. Beyond the notice requirement, which requires employers to notify FDC workers of whether or not their contracts will be renewed when they are nearing expiration, the only other limitation on contract non-renewal is that an employer cannot refuse to renew an FDC for reasons of anti-union discrimination.³⁵ Anti-union discrimination is extremely difficult to prove, and employers face no other real restrictions on their ability to refuse to renew FDC workers' contracts. Because employers do not need to provide any justification for non-renewal, FDC workers are vulnerable to having their employment discontinued for reasons that would not rise to the level of "serious misconduct" required for lawful termination.

³² See, for example, Arbitration Council Arbitral Award 51/04-*San Han Garment*.

³³ Arbitral Award 53/06-*Hong Mei*. Examples of the employer's burden of proving serious misconduct can be found in Article 83(B) of the Cambodian Labor Law.

³⁴ Arbitral Award 76/05-*Global Footwear*.

³⁵ Arbitral Award 28/07-*Dae Kwang*.

Employers are also using FDCs of increasingly short durations (such as six-month, three-month, or even one-month FDCs³⁶), effectively allowing them to terminate workers without formally terminating their contracts; instead, they can simply wait for these super-short-term contracts to expire. This shift away from UDCs and toward increasingly short-term FDCs renders the “serious misconduct” protection against wrongful termination largely ineffective.

c. Compensation Due Upon Termination

Because short-term workers qualify for severance pay to a lesser extent than permanent workers, employers have an incentive to hire workers

Differences in Worker Rights at End of Employment, by Type of Contract	
<u>UDC Workers</u>	<u>FDC Workers</u>
Longer notice periods before termination for all durations of service	Shorter notice periods before termination for all durations of service
Employers required to give a reason when terminating a contract	No reason required when employers do not renew a contract
Entitled to damages for unfair termination, as well as to termination indemnification in certain cases	Fewer rights to damages if employer uses non-renewal instead of termination, and harder to get indemnification when terminated

under FDCs. There are two forms of compensation to which an employee may be entitled upon termination that an employer can avoid or reduce by using FDCs. First, there are damages that employers must pay to workers if they are terminated without valid reason. FDC workers can be cheaper because employers can, if they use non-renewal instead of termination, avoid having to give reasons for ending a worker’s employment. Second, there may be termination indemnification that the employer must pay the worker, depending on the circumstances surrounding the worker’s termination. Be-

³⁶ See, for example, Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with E. Garment Worker #2, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #3, Phnom Penh, Cambodia, Mar. 19, 2009.

cause of the way this termination indemnification is calculated, workers hired under FDCs may receive less compensation when they are terminated than workers hired under UDCs.

Article 89 of the Labor Law requires indemnity for dismissal in all cases where the dismissal was not based on a serious offense. According to Article 89, dismissal indemnification is calculated as: 7 days wages and fringe benefits for continuous service of 6-12 months; 15 days wages and benefits for each year of service greater than 1 year, with each six months being rounded up and the total indemnity not to exceed six months worth of wages and benefits. Indemnity for dismissal is calculated based on the time of “continuous service” and is not available to workers who did not provide continuous service for at least six months. Because of this, FDC workers who were hired on contracts for less than six months, but who provided more than six months of continuous service when successively renewed FDCs are taken into account, may have difficulty claiming indemnification. If employers calculate the length of continuous service based only on the current contract or require mandatory leave between the end of one FDC and the start of another, FDC workers may not be able to show the requisite period of continuous service to claim dismissal indemnification. As a result, they may be less expensive for employers to terminate than they would be if they were hired under UDCs.

4. Differences in Entitlements Under Cambodian Labor Law

a. Differences in Paid Annual Leave

In addition to differences in the ease and cost of ending the employment relationship, there are other differences between the benefits to which FDC and UDC workers are entitled under the law. Like the provisions in the Labor Law related to termination indemnification, the provisions in the Law regulating paid annual leave require a calculation of months of “continuous service.”³⁷ Depending on how “continuous service” is measured, workers hired under FDCs may not be eligible for the same annual leave as workers hired under UDCs.

According to Article 166 of the Labor Law, an employee who works an average of twenty-one days per month satisfies the requirement of “continuous service” for the purpose of determining paid annual leave. Moreover, the Arbitration Council has held that casual or “floating” employees who are not employed continuously year-round are entitled to the same paid annual leave as permanent employees if they meet the 21-days-per-month requirement. In Arbitral Award 23/05-Jung Min, the Arbitration Council found:

³⁷ Cambodia Labor Law, art. 166.

[W]hether the employer calls a worker a “floating worker” or any other name, if a worker works an average of at least 21 days for two consecutive months, then such worker should be considered a regular worker. This principle of 21 working days in two consecutive months has become a part of the Arbitration Council’s established jurisprudence.³⁸

According to the Ministry of Labor’s July 18, 2000 Notification No. 017 on the Minimum Wage of Garment Workers (“Notification No. 017”), “workers who regularly work for 12 months shall get 18 days annual leave.” This reaffirms Article 166 of the Labor Law, requiring that “all workers are entitled to paid annual leave . . . at the rate of one and a half work days of paid leave per month of continuous service,” which amounts to 18 days per year. Workers meeting the 21 days per month work requirement, even if they are hired under FDCs, ostensibly should benefit from the paid annual leave described in Article 166; Notification No. 017, restating the Law, does not indicate otherwise.

Although it is not clear from either the language of the Labor Law or the terms of Notification No. 017 why employees would not have access to the same paid annual leave regardless of their status as FDC or UDC workers, a review of claims for paid annual leave brought before the Arbitration Council indicates that workers who were hired under FDCs have more difficulty securing paid annual leave. The worker who was a claimant in the *Kin Tay Garment* case before the Arbitration Council, for example, claimed that the factory had relied on Article 167 of the Labor Law, which stipulates that “the right to use paid leave is acquired after one year of service,” to prevent workers hired under FDCs of less than one year from receiving paid annual leave.³⁹ As with other benefits conditioned upon a minimum period of continuous service, the law as it is written does not distinguish between FDC and UDC workers when providing for annual leave. However, the law as applied may discriminate against workers hired under FDCs because of the way employers calculate continuous service. One possible explanation for this is that because employers can terminate workers hired under FDCs more easily and at lesser cost than workers hired under UDCs, workers fear their contracts will not be renewed and are less likely to dispute an employer’s calculation of these benefits.

³⁸ Arbitral Award 23/05 *Jung Min*; see also Arbitral Awards 44/06-*Goldfame*, 55/04-*You Cheng*, 69/04-*Common Way*, and 85/04-*Kang Ning*.

³⁹ Arbitral Award 92/07-*Kin Tay Garment*.

b. Differences in Seniority Rights

Under the Labor Law, seniority bonuses are distributed according to total length of regular employment. Notification No. 017 provides for the payment of increasing “seniority bonuses” beginning after one year of work;⁴⁰ it does not describe how seniority increments can be distributed to FDC workers who have worked regularly for longer than one year but have done so on successively renewed, short-term contracts. Article 73 of the Labor Law provides that where an FDC is converted to or replaced by a UDC, the seniority of the worker under the new contract should be calculated to include the cumulative time worked under the old FDC. This indicates that all workers, regardless of the contracts under which they work, should benefit from the seniority increments described in Notification No. 017, since the spirit of the Labor Law clearly recognizes continuity of service even with FDC contracts. Both the Labor Law and Notification No. 017, however, fail to address explicitly the accrual of seniority bonuses for FDC workers hired on successively renewed contracts where the sum of the contracts exceeds the one-year eligibility requirement but each individual FDC is for a duration of less than one year. This makes it difficult for many FDC workers to claim the seniority bonuses described in the Notification.

c. Differences in the Effect on Pregnancy Discrimination and Maternity Leave

The Cambodian Constitution prohibits all forms of discrimination against women.⁴¹ Moreover, the Constitution not only prohibits adverse employment action on the basis of pregnancy, but also requires paid maternity leave for women workers.⁴² Article 46 of the Constitution states: “A woman shall not lose her job because of pregnancy. Women shall have the right to take maternity leave with full pay and with no loss of seniority or other social benefits.” The Labor Law, however, is not fully consistent with the Constitution on this point. Although Article 182 of the Labor Law requires that “women shall be entitled to a maternity leave of ninety days,” Article 183 of the Labor Law stipulates that women “are entitled to half their wage” during maternity leave, which falls short of the “maternity leave with full pay” required by Article 46 of the Constitution. Furthermore, according to the Labor Law, although women in “all enterprises” are guaranteed maternity

⁴⁰ Ministry of Labor, Notification No. 017 on the Minimum Wage of Garment Workers, July 18, 2000, at para. 5 [hereinafter Notification No. 017].

⁴¹ Cambodian Constitution, art. 45.

⁴² Cambodian Constitution, art. 46.

leave,⁴³ maternity leave with pay “shall only be granted to women having a minimum of one year of uninterrupted service in the enterprise.”⁴⁴ This requirement of “uninterrupted service” may result in a disadvantage for women hired under FDCs whose employment is steady but not continuous.

FDC termination and non-renewal without cause also contribute to pregnancy discrimination. Increased hiring under FDCs creates a risk that women who become pregnant can be terminated with shorter notice and potentially at lesser cost to the employer than women hired under UDCs. Even if an employer does not terminate pregnant workers, it may still avoid paying compensation during maternity leave. By hiring women on renewable short-term contracts, employers can ensure that the women workers will not meet the minimum eligibility requirement, one year of “uninterrupted service,” for maternity leave with pay.

Increased hiring under FDCs creates a risk that women who become pregnant can be terminated with shorter notice and potentially at lesser cost to the employer than women hired under UDCs.

B. The Widespread Use of FDCs Conflicts with International Law

This section examines how garment manufacturers’ current practice of building a permanent workforce using perpetually renewed short-term contracts might threaten Cambodia’s compliance with international labor standards. It focuses on two areas in particular where Cambodia’s labor policy might be in direct conflict with the country’s international legal obligations: (1) termination of employment; and (2) freedom of association. Four sources contain the international labor standards examined in this analysis: the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Cultural, and Social Rights (“ICESCR”), and standards established by the ILO.

⁴³ Cambodia Labor Law, art. 182.

⁴⁴ Cambodia Labor Law, art. 183.

1. Adequate Safeguards Against Abusive Use of FDCs

The only source of international labor law dealing directly with the use of short-term contracts is ILO Convention 158, on “Termination of Employment at the Initiative of the Employer” (“Termination of Employment Convention”). The Convention was adopted by the ILO in 1982 and entered into force in 1985; it has been supplemented by ILO Recommendation 166, the “Termination of Employment Recommendation,” which gives guidance on the implementation of the Convention. Cambodia has not ratified the Termination of Employment Convention, and Recommendation 166, like all ILO recommendations, is not a legally binding instrument. The ILO Convention and associated recommendation represent, however, the most authoritative international standards dealing with labor contracts. Even if Cambodia, because it is not a party to the Convention, is not legally bound by the standards it sets forth, the Cambodian government’s failure to comply with the relevant provisions of Convention 158 and Recommendation 166 would represent a divergence from the most authoritative international principles on labor contracts.

Convention 158 specifies that employers may not terminate workers for, among other reasons, union membership, participation in union activities, or pregnancy.⁴⁵ The Convention states that workers on fixed-term contracts may be exempt from some of its protections but specifically forbids the use of fixed-duration contracts for the purpose of avoiding the other provisions of the Convention. It states: “Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time *the aim of which is to avoid the protection resulting from this Convention.*”⁴⁶ A factory’s use of short-term contracts to target union members or dismiss pregnant workers clearly violates the Convention’s standard.

The Convention’s stipulation that “adequate safeguards shall be provided” goes even further: It requires states to take measures to protect against private employers’ improper use of fixed-duration contracts. According to international labor standards, then, the Cambodian government has a responsibility to ensure that factories cannot use the flexibility of the labor contract to deprive workers of their rights. Although Cambodia has not ratified it and, therefore, is not legally bound by its provisions, Convention 158 articulates the authoritative ILO standard on labor contracts. As a member of the ILO, the Cambodian government should strive to bring its labor practices in line with this standard. If there is good reason to believe that factories will use FDCs to

⁴⁵ ILO Convention No. 158 Concerning Termination of Employment Convention, 1982, art. 5.

⁴⁶ *Ibid.* Art. 2(3) (emphasis added).

deprive workers of their rights, the government should take steps to prevent this from happening. One way to do this would be to promulgate and enforce adequate restrictions on how FDCs can be used. If, however, the government is unable to carry out the enforcement necessary to make sure that employers obey such restrictions, those restrictions could hardly be considered “adequate safeguards,” and some other measures would be necessary.

ILO Recommendation 166 suggests three courses of action for a state to satisfy the “adequate safeguards” requirement. States should:

1. limit FDCs to situations where, owing to the nature of the work or the employer, the contract cannot be of unlimited duration;
2. require that contracts made for a specified period of time that do not fall into the above category be treated as UDCs; and
3. require that all FDCs renewed one or more times become UDCs.⁴⁷

Although ILO recommendations do not carry the binding legal force of conventions, they elucidate the ILO’s perspective on how a country can best bring itself into compliance with international labor standards. To comply with this recommendation, Cambodia would have to forgo its proposal to make FDCs indefinitely renewable. Indeed, it would have to implement greater protections than exist under the current law in order to guarantee that employers do not use FDCs to miscategorize permanent workers and deprive them of their rights.

2. The Right to Freedom of Association

Many international law instruments, including several that Cambodia has ratified, guarantee the right to freedom of association. The UDHR’s Article 20 affirms the right to “freedom of peaceful assembly and association.” Although the UDHR is not a treaty, many of its provisions, including Article 20, have been enshrined in later conventions and are so well established that they are widely considered to have become customary international law. The IC-CPR protects the right to freedom of association, and both the ICESCR and the ICCPR expressly guarantee the right to join trade unions.⁴⁸ Because Cambodia is

The ICCPR protects the right to freedom of association, and both the ICESCR and the ICCPR expressly guarantee the right to join trade unions.

⁴⁷ ILO Recommendation 166 Concerning Termination of Employment, 1982, sec. I, para. 3.

⁴⁸ International Covenant on Economic, Social, and Cultural Rights, art. 8, Dec. 16, 1966 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, art. 22,

a party to both of these treaties, it is legally bound by them to uphold these rights.

Both the ICCPR and the ICESCR require that state parties “ensure” the rights they enumerate.⁴⁹ In the case of the ICCPR, the UN Human Rights Committee has stated that this requirement places both “negative and positive” duties on states to protect the rights contained in the Convention.⁵⁰ In other words, the Cambodian government is required to do more than just avoid directly infringing upon its citizens’ right to freedom of association; it is required to take positive steps to protect that right against infringement by others. If the Cambodian government allows garment manufacturers to infringe upon its citizens’ right to free association, the government will be in violation of the freedom of association guarantees of the ICCPR and the ICESCR.

Cambodia is also bound by ILO standards relating to freedom of association. Cambodia is a member of the ILO and has ratified all eight fundamental ILO Conventions. It is, therefore, legally obligated to uphold the ILO “core” labor standards, including the right to freedom of association. Freedom of association is protected by ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise) and 98 (The Right to Organise and Collective Bargaining), both of which Cambodia has ratified. Convention 87 establishes the right of workers “to join organizations of their own choosing without previous authorization,”⁵¹ while Convention 98 mandates that workers be protected from acts that make their employment subject to the condition that they not join a union.⁵² Convention 87 further provides, “The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”⁵³ To the extent that the proposed amendment to the Labor Law would impair freedom of association (discussed at greater length below), it conflicts with Cambodia’s obligations under international law.

Dec. 16, 1966 (entered into force Mar. 23, 1976).

⁴⁹ International Covenant on Economic, Social, and Cultural Rights, art. 3; International Covenant on Civil and Political Rights, art. 2.

⁵⁰ International Covenant on Civil and Political Rights, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, May 26, 2004, available at <http://www.unhcr.ch/tbs/doc.nsf/o/58f5d4646e861359c1256ff6005333f5f?Opendocument>

⁵¹ ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, 1948, pt. I, art. 2.

⁵² ILO Convention No. 98 Concerning Right to Organise and Collective Bargaining, 1949, art. 1.

⁵³ ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, 1948, pt. I, art. 8(2).

The ILO Committee on Freedom of Association issues decisions on complaints alleging violations of the right to freedom of association. Its decisions constitute an authoritative elaboration of the freedom of association standards and specific conduct that violates them. The Committee has heard several cases relating to anti-union discrimination by employers in Cambodia. In its decisions, the Committee has described patterns of anti-union discrimination and has consistently held that temporary workers enjoy the same protections under Conventions 87 and 98 as permanent workers.⁵⁴ The right to freedom of association remains the same, therefore, regardless of whether a worker is employed under an FDC or a UDC.

The Committee has also indicated that the Cambodian government is responsible for taking affirmative steps to combat anti-union discrimination by private employers. In a case in which four trade union leaders claimed that their dismissal was an act of anti-union discrimination, the Committee held that the Cambodian government “is responsible for preventing all acts of anti-union discrimination.”⁵⁵ It also held that Cambodian law must “establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention 98.”⁵⁶ The government’s obligation to protect the right to freedom of association thus extends beyond the requirement that it avoid passing laws that directly infringe upon that right. It must also take positive steps to ensure that union members are protected from discrimination by private employers. By failing to take adequate steps to protect all workers – whether on UDCs or FDCs – from anti-union discrimination, the Cambodian government risks violating not only Cambodian law, but also the international agreements to which it has agreed to be bound.

To the extent that the proposed amendment to the Labor Law would impair freedom of association . . . it conflicts with Cambodia’s obligations under international law.

⁵⁴ Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, para. 255 (5th ed. 2006).

⁵⁵ Freedom of Association Committee of the Governing Body of the ILO, Complaint against the Government of Cambodia presented by the Cambodian Tourism and Service Workers Federation (CTSWF) Report No. 344, Case(s) No(s). 2468, available at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=statuso1&textbase=iloeng&document=4678&chapter=3&query=Cambodia%40ref&highlight=&querytype=bool&context=0>.

⁵⁶ Ibid.

V. Debating Opposing Claims About the Effects of FDCs

The previous Part analyzed the impact of FDCs on workers' rights through the lenses of both Cambodian and international labor law. Recognizing that all of the stakeholders in the debate over FDCs share a commitment to the success of Cambodia's garment industry and that part of what has driven the growth of the industry so far has been the country's reputation for improving worker conditions, this Part analyzes the goal of keeping Cambodia's garment industry competitive. It considers, first, competing claims about the importance of FDCs to the garment industry (Sections V.A and V.B), as well as problems with FDCs that should concern all stakeholders (Section V.C). Then it examines how some of Cambodia's competitors in the garment export sector have taken different policy approaches that may be useful to Cambodian dialogue on this issue (Section V.D).

A. Employers and Government Officials Argue for the Increased Use of FDCs

1. Increased Use of FDCs Is Needed to Keep the Garment Industry Competitive

Although Cambodia tried to establish a competitive advantage over other garment-exporting countries by marketing itself to western buyers as providing more protections for workers than its competitors, the country's largest garment manufacturers argue that upholding higher labor standards may actually be harming Cambodia's garment industry. In an interview with the Lowenstein Clinic, Kaing Monika, Business Development Manager for the GMAC, described how Cambodia is losing business to countries known for their failure to adequately protect workers' rights. Mr. Monika said that the GMAC saw an overall decline in orders during 2008, while, over the same period, orders to factories in Bangladesh increased by 30% and orders to factories in Vietnam grew by 20%.⁵⁷ According to Mr. Monika, "'cheap' is the only key word in business. If you can deliver fast and cheap, then you get business."⁵⁸

Mr. Monika emphasized that the GMAC is committed to compliance with international labor standards, which is why it works with Better Factories Cambodia. He also said, however, that the GMAC is "disappointed" that international buyers do not "show more support [to countries with higher

⁵⁷ Lowenstein Clinic Interview with Kaing Monika, Business Development Manager for the GMAC, Phnom Penh, Cambodia, Mar. 17, 2009.

⁵⁸ *Ibid.*

labor standards] by giving more orders.”⁵⁹ Interviews with both Mr. Monika and factory managers indicated a strong concern over business lost to lower-cost manufacturers in other countries and the sense that, particularly during the global economic crisis, there is a need to make the Cambodian garment industry more competitive by reducing production costs.

Garment manufacturers believe that putting more workers on FDCs is key to keeping the Cambodian garment industry competitive. Manufacturers argue that buyer demand is cyclical and that shorter-term contracts allow factories greater flexibility to adjust their workforces to changes in buyer demand. Mr. Monika sees direct links between manufacturer flexibility, FDCs, and foreign investment:

What we need in the garment industry is flexibility in labor contracts so that we can deal with changes between high and low seasons. . . . FDCs offer flexibility, and flexibility is also what encourages foreign direct investment Businesses can't afford to have all their workers on UDCs. Because of the seasonal nature of the industry and the need to sometimes fill excess orders, we need flexibility in the labor contract.⁶⁰

Describing the garment industry in China, Mr. Monika stated employers are permitted to hire workers on successive FDCs for up to ten years before they have to put them on UDCs, which he thinks is better for the economy than the (disputed) two-year rule in Cambodia. The GMAC's position, according to Mr. Monika, is that FDCs are necessary to create a flexible and cost-efficient workforce, which is what will attract foreign direct investment to Cambodia. Because factories, however, will undoubtedly need some permanent employees even during the slow part of the season, Mr. Monika said that the GMAC does not support factories converting their entire workforces to FDCs.⁶¹ This position, Mr. Monika acknowledged, has not been disseminated to GMAC member factories,⁶² many of which contradict this position by hiring 100% of their workforces on FDCs.⁶³

Since carrying extra workers is costly, especially if those workers are entitled to all of the benefits attached to UDCs, factory management sees a

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Survey research on factory practices, conducted by the Workers' Rights Consortium (on file with Clinic).

shift toward FDCs as a way to cut costs and protect factories from redundancies in their workforce. In an interview with the Lowenstein Clinic, Albert Tan – who serves as both Regional Vice President for Ocean Sky, the country’s largest garment manufacturer, and Treasurer of the GMAC – addressed the relationship between the competitiveness of the Cambodian garment industry and the types of labor contracts available to employers. Mr. Tan said that “there must be shorter contracts” and that “no firm can tell you how short a period they need.”⁶⁴ Thus, for Mr. Tan, even allowing factories to hire workers on successive FDCs, but fixing the minimum duration for such contracts, would not provide manufacturers the flexibility they need to stay competitive. He told the Lowenstein Clinic that factories want continuity in their workforce, particularly among skilled workers, “but the industry needs flexibility; otherwise it cannot manage its funding and will end up over budget.”⁶⁵ In an economic climate in which “there are already many factories surviving month to month,” Mr. Tan and the other factory management represented by the GMAC argue that FDCs are essential to keeping the Cambodian garment industry alive.⁶⁶

2. Workers Prefer FDCs to UDCs

Garment manufacturers also claim they are switching to FDCs because workers prefer them. In the Clinic’s interviews, factory management, government officials, and some labor unions offered three different reasons that workers prefer FDCs. One reason employers offered is that FDCs allow a worker to unilaterally break her employment contract before the end of the contract and still receive some severance payment. How much severance payment a worker can receive when she terminates an FDC early is unclear because the text of the Labor Law is, itself, ambiguous on this point; however, according to one interpretation of the text, a worker can receive at least 5% severance, calculated on the basis of the wages she has earned up until the time she breaks her contract.⁶⁷

⁶⁴ Lowenstein Clinic Interview with Albert Tan, Regional Vice-President for Ocean Sky and Treasurer of the GMAC, Phnom Penh, Cambodia, Mar. 21, 2009.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ How much severance payment a worker can get when she breaks an FDC early is unclear because the governing legal provision, Article 73, paragraph 6, of the Cambodian Labor Code, uses ambiguous Khmer language; it can be understood to provide 5% severance payment based on either the “cancellation” or the “expiration” of the FDC. The first interpretation (“cancellation”) of the language calculates severance based on the wages earned up until the time the worker breaks the contract; the latter interpretation (“expiration”) calculates severance based on wages that would have been earned through the end of the FDC. If a worker breaks her FDC without justification, her employer may claim damages that the worker must then pay.

A second reason that workers prefer FDCs, according to employers, is that FDCs afford them greater job mobility. One of the leaders of the Cambodian Federation of Independent Trade Unions (“CFITU”) – which is generally viewed as moderately government friendly – told the Clinic that workers know that “if they resign under a UDC [and leave for a better job], then they will get no severance,” so “some workers” would prefer FDCs because they can leave for another job when the FDC expires and receive 5% severance.⁶⁸ The Ministry of Labor’s Director General, Seng Sakda, echoed this logic. According to Mr. Sakda, if he were a worker deciding which kind of contract he wanted to sign, he would want the severance pay that comes with an FDC, since workers on FDCs “have the freedom to leave and . . . go to another employer at the end of their contract.”⁶⁹

The third and most common reason employers offered was that FDCs insulate the workers from the risk of a factory closing and the owners leaving without paying the termination indemnification and other benefits that workers have accrued over the course of their contracts; this has happened at a number of factories in recent years. Ravind Takan, the Compliance Officer at New Wide’s Grandtex factory in Phnom Penh, explained how risk reduction might motivate worker preference for shorter-term contracts: “When the factory collapses and the owner leaves 1,000 workers without paying them, they prefer FDCs.”⁷⁰ According to Mr. Takan, Grandtex asks workers on its recruitment form whether they would prefer to be hired on a UDC or an FDC, and “they all prefer FDCs.”⁷¹ The Manager of Grandtex, Chu Man Pun, confirmed this, saying that when workers are given the choice between two-year, one-year, and six-month contracts, “now more people choose to be on six-month FDCs.”⁷² During the Lowenstein Clinic’s visit to the Ocean Sky factory, Albert Tan also emphasized that abrupt factory closures in 2006, “where the factories closed and couldn’t pay everything due upon severance,” motivated workers to prefer FDCs.⁷³ Mr. Tan even argued that because the law of severance pay is so weakly enforced, it is factory

⁶⁸ Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

⁶⁹ Lowenstein Clinic Interview with Seng Sakda, Director General of Ministry of Labor, Phnom Penh, Cambodia, Mar. 18, 2009.

⁷⁰ Lowenstein Clinic Interview with Ravind Takan, Compliance Officer for Grandtex, Phnom Penh, Cambodia, Mar. 20, 2009

⁷¹ Ibid.

⁷² Lowenstein Clinic Interview with Chu Man Pun, Manager for Grandtex, Phnom Penh, Cambodia, Mar. 20, 2009.

⁷³ Lowenstein Clinic Interview with Albert Tan, Regional Vice-President for Ocean Sky and Treasurer of the GMAC, Phnom Penh, Cambodia, Mar. 21, 2009.

management – not factory workers – who “logical[ly] . . . would prefer UDCs because then [they] wouldn’t have to pay severance if [the] factory closes.”⁷⁴ It is the workers who benefit from having contracts regularly “cleared” at the conclusion of each FDC because such a practice ensures that a factory’s closing and an owner’s departure do not leave the workers without the severance pay to which they have built up a right over years of employment.⁷⁵

Thus, the third reason suggested by factory management for workers preferring FDCs is two-fold. First, because workers fear that factories will close and run away without paying any severance, the workers choose FDCs over UDCs to guarantee at least 5% severance payment. Second, it is in the factory owners’ interest to employ workers on UDCs because doing so allows them to close factories and leave without paying severance.

These two components of the management’s analysis, however, must be evaluated in light of the context in which workers are hired and factories closed. First, it is true that the workers interviewed by the Clinic told many stories of factory closings in which workers had been left without compensation that was due to them under their contracts.⁷⁶ The Clinic’s interviews clearly showed that workers genuinely feared that their factories could do the same to them. However, none of the workers interviewed recounted having had a choice between FDCs and UDCs when they were hired.⁷⁷ This suggests that workers were not actually choosing FDCs as a result of their fear that factories would close and leave them with no severance. Second, although many factory owners have done just what Mr. Tan described – close their factories without paying severance – lack of enforcement of the law, not the fact that workforces were comprised of UDC workers, allowed them to do so. The Labor Law clearly requires factory owners to pay both UDC and FDC workers the compensation due to them under Section III of the Law when closing a factory, unless the closure is due to an act of god, which, Article 87 of the Labor Law notes, does not include bankruptcy or insolvency. Thus, these two qualifications cast doubt on the legitimacy of the third reason offered by factory management for workers preferring FDCs – that FDCs

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ See, for example, Lowenstein Clinic Interview with MSI Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009.

⁷⁷ See, for example, Lowenstein Clinic Interview with New Wide Factor Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #2, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #8, Phnom Penh, Cambodia, Mar. 20, 2009.

ensure that workers receive some amount of their termination indemnification and benefits if the factory should close and the owner disappear without paying them. In sum, it seems that workers may not actually be choosing FDCs themselves, and if they are, such a choice may simply be the product of a dysfunctional enforcement system.

3. The Khmer Version of the Labor Law Supports Increased Use of FDCs

In addition to arguing that FDCs will help keep the Cambodian garment industry competitive and are preferred by workers, garment manufacturers argue that the Labor Law should be amended because the law currently governing FDCs is unclear. The Arbitration Council's award in the *Jacqsintex* case clearly stated the Council's position that Article 67(2) caps at two years the total length of time a worker can be put on successive FDCs.⁷⁸ Garment manufacturers and some officials within the Ministry of Labor, however, dispute the Arbitration Council's decision. They claim that the Law is ambiguous on the point of whether or not there is a cap on the number of years past which FDCs can be repeatedly renewed and argue instead for an interpretation of the law that would permit indefinite renewal of FDCs as long as each renewal is for a period of less than two years.

According to Mr. Monika of the GMAC, disagreement over the proper interpretation of Article 67 stems from different entities relying on two different versions of the Labor Law: the Ministry of Labor relies on the Khmer version, and the Arbitration Council does not.⁷⁹ Another government official at the Ministry of Labor said that the Khmer version of Article 67 supports the position that employers can repeatedly renew FDCs as long as "each" renewal does not exceed two years and that it is the English version of the law that is unclear.⁸⁰ Mr. Tan of Ocean Sky also said that the Khmer version of the law is clear on this point. According to Mr. Tan, the reason that the Arbitration Council's interpretation of Article 67 differs from the interpretation endorsed by members of the GMAC and some Ministry of Labor officials has to do with the history of the Arbitration Council. By Mr. Tan's account, ILO experts, relying on the English version of the law, provided technical assistance to the Arbitration Council, which resulted in the Arbitration Council's decision incorporating the ambiguity of the English

⁷⁸ Arbitral Award 10/03-*Jacqsintex*.

⁷⁹ Lowenstein Clinic Interview with Kaing Monika, Business Development Manager for the GMAC, Phnom Penh, Cambodia, Mar. 17, 2009.

⁸⁰ Lowenstein Clinic Interview with government official, Labor Dispute Resolution Department at the Ministry of Labor, Phnom Penh, Cambodia, Mar. 18, 2009.

text into the Council’s interpretation of Article 67.⁸¹ However, according to legal experts from the Arbitration Council Foundation – a body that provides technical assistance to the Arbitration Council – the Council believes that, in interpreting Article 67, it stuck closely to the text and history of the 1997 Labor Law while taking into account formal ILO recommendations.⁸²

B. Labor Unions and NGOs Argue Against the Increased Use of FDCs

1. The Existing Labor Law Provides Enough Flexibility for the Garment Industry to Remain Competitive

While GMAC representative Kaing Monika emphasized the need for a more flexible contract regime that would allow garment manufacturers to manage their workforces in accordance with the demand cycle of the industry, labor unions and NGOs argue that the Labor Law already contains provisions for seasonal hiring that give employers the flexibility they need to manage the size of their workforces in accordance with natural business cycles. A representative of the Coalition of Cambodian Apparel Workers Democratic Union (“C. CAWDU”) said there is “no real reason behind GMAC’s claim that factories need FDCs to increase their flexibility to adjust to seasonal trends,” because “if factories want to fit their hiring to seasonal orders, they can do that already—the

A representative of the Coalition of Cambodian Apparel Workers Democratic Union (“C. CAWDU”) said there is “no real reason behind GMAC’s claim that factories need FDCs to increase their flexibility to adjust to seasonal trends,” because “if factories want to fit their hiring to seasonal orders, they can do that already—the Labor Law already allows that.”

⁸¹ Lowenstein Clinic Interview with Albert Tan, Regional Vice-President for Ocean Sky and Treasurer of the GMAC, Phnom Penh, Cambodia, Mar. 21, 2009.

⁸² Lowenstein Clinic Interview with legal experts from the Arbitration Council Foundation, Phnom Penh, Cambodia, Mar. 16, 2009.

Labor Law already allows that.”⁸³ Representatives from both the labor NGO Womyn’s Agenda for Change (“WAC”) and the Cambodian Confederation of Trade Unions (“CCTU”) labeled the flexibility argument an “excuse.”⁸⁴ Like the representative from C.CAWDU, the CCTU representative interviewed by the Clinic argued that the Labor Law already has an article that provides employers the right to hire for seasonal demand, “which gives them the flexibility they need.”⁸⁵

The 1997 Labor Law does expressly provide for labor market flexibility. It contains sections that allow and regulate seasonal employment⁸⁶ and mass layoffs.⁸⁷ These provisions constitute a legal basis for the claim by unions and NGOs that the Law already gives employers the flexibility they need to cope with both the natural ups and downs of the business cycle and the unexpected drops in demand that have come with the global economic crisis.

In interviews, union representatives and workers did not dispute the existence of high and low seasons in the garment industry, but they indicated that seasonal changes in demand do not justify the current move toward FDCs. A worker from the E Garment factory,⁸⁸ for example, told the Lowenstein Clinic:

I would not have any objection to the practice of putting some workers on FDCs, say if they need to add 300 to a factory of 3,000 during peak season. We understand the operation of the factory. The problem is that this factory has the bad habit of keeping *all* the workers on short-term contracts.⁸⁹

⁸³ Lowenstein Clinic Interview with a C.CAWDU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

⁸⁴ Lowenstein Clinic Interview with a CCTU union leader, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

⁸⁵ Lowenstein Clinic Interview with a CCTU union leader, Phnom Penh, Cambodia, Mar. 19, 2009.

⁸⁶ Cambodia Labor Law, art. 88.

⁸⁷ Cambodia Labor Law, art. 95.

⁸⁸ At the time of the Clinic’s interviews, E Garment was employing all of its workers on FDCs. The factory has since changed its practice and is now one of only two factories in Cambodia that has been identified as employing workers exclusively on UDCs. The quotes in this report from E Garment workers reflect circumstances during the time period when the factory still used FDCs.

⁸⁹ Lowenstein Clinic Interview with E Garment Factory Worker #3, Phnom Penh, Cambodia, Mar. 17, 2009 (emphasis added).

A representative from the Cambodian Labour Union Federation (“CLUF”) complained: “In our opinion, employers should only use short-term contracts for sub-contracting, temporary work, or seasonal work . . . We don’t think that FDCs should be used for continuous contract work.”⁹⁰ On this point, the position expressed by labor union representatives is not drastically different from that expressed by GMAC representative Mr. Monika, who told the Clinic that it does not make sense for a factory’s entire labor force to be hired under FDCs.⁹¹

Garment manufacturers’ arguments in favor of increased contract flexibility are not just arguments about the normal ups and downs of the business cycle. Employers also claim they need greater flexibility to deal with the current economic crisis, with the possibility of huge drops in demand that are not part of the natural business cycle. Unions and NGOs criticize this argument, too. Representatives of WAC told the Clinic that they thought GMAC was using arguments about competition and the financial crisis to pressure the government into giving them more control over workers.⁹² They pointed out that the Labor Law not only provides for seasonal employment, but also has provisions that guarantee employers the flexibility they need in times of severe and unexpected economic downturn: “Factory owners say they need more flexibility in the current economic crisis, but there is a procedure for mass layoffs in the law that is not followed.”⁹³

2. Workers Do Not Actually Prefer FDCs over UDCs

Although garment manufacturers claim that workers prefer FDCs to UDCs, unions and workers themselves dispute that claim. Veasna Nuon, National Coordinator of the ILO’s Worker Education Project (“ILO-WEP”), stated that only “a very small minority” of unions say that their members prefer FDCs.⁹⁴ Mr. Nuon described, in contrast to the alleged worker support for FDCs, “almost an unprecedented consensus”⁹⁵ among major unions that they should fight for UDCs. On December 24, 2008, a federation of garment

⁹⁰ Lowenstein Clinic Interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

⁹¹ See Part V.A.1 of this report above.

⁹² Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

⁹³ *Ibid.* Article 95 of the 1997 Cambodia Labor Law regulates mass layoffs. Article 88 permits employers using seasonal workers to terminate them at the end of the high season without the termination being classified as a “dismissal” requiring severance payments under the law, in contrast to the 5% severance due to all FDC workers upon termination.

⁹⁴ Lowenstein Clinic Interview with Veasna Nuon, National Coordinator of the ILO-WEP, Phnom Penh, Cambodia, Mar. 16, 2009.

⁹⁵ *Ibid.*

industry union leaders met to discuss the proposed amendment; the next day, they sent a letter to the Minister of Labor and Vocational Training, signed by all of the federation leaders, requesting that the Ministry reconsider the proposed amendments to Articles 67 and 73 of the Labor Law. In their December 24th letter, the unions cited concerns over the negative impact on job security, freedom of association, and seniority-linked benefits (including maternity leave and social security) that amending the law could have.⁹⁶ The December 24th letter was not the first time Cambodian unions had shown solidarity around the issue of the misuse of FDCs. On February 14, 2007, a group of 17 unions and NGOs sent a similar joint statement to Minister of Labor H.E. Vorng Soth, warning that a draft circular produced by the Ministry of Labor that contradicted the AC's interpretation of Article 67 "reflect[ed] a lack of commitment to upholding decent working conditions, and may jeopardize the continued viability of th[e] industry," because of the negative impact it would have on Cambodia's reputation among international buyers.⁹⁷

Even where workers actually seem to prefer FDCs, the Clinic's interviews illustrate two ways in which workers may not actually be choosing FDCs over UDCs in a voluntary manner. First, even when workers do state a preference for FDCs, they may be forced into this preference out of a fear of losing severance pay; this would not constitute a voluntary choice of FDCs. An ILO advisor described why workers on UDCs might feel heightened anxiety about factories closing down and owners leaving:

If you're on a UDC and you've been working for a year or more, you've built up a great deal of severance pay that you're owed. If the factory closes and you don't get paid, you've lost a lot more money than you would have lost if you'd been on a series of FDCs.⁹⁸

This was corroborated by a representative from Voice of Workers, a radio broadcast group in Phnom Penh that develops programming related to issues of workers' rights, who stated that some unions advocate for FDCs "if they are worried that the factory will close and everyone on UDCs will get nothing."⁹⁹ As stated above, the argument that workers might prefer FDCs out of fear of factories closing is the result of employers closing facto-

⁹⁶ Letter from a union federation to Ministry of Labor and Vocational Training, Dec. 24, 2008.

⁹⁷ Letter from a union federation and NGOs to Ministry of Labor and Vocational Training, Feb. 14, 2007.

⁹⁸ Lowenstein Clinic Interview with an advisor to the ILO-DRP, Phnom Penh, Cambodia, Mar. 16, 2009.

⁹⁹ Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009.

ries without notice and without paying the many benefits workers on UDCs accumulated over their long service. The “fear of flight” argument is essentially an argument about the next-best option for workers when the laws that should be protecting them are not enforced. If factories were required to comply with the regulations applicable to factory shut-downs, workers would no longer be motivated to prefer FDCs as a way to mitigate the risk of flight. Second, workers who claim to prefer FDCs may not actually understand the differences between FDCs and UDCs, calling into question whether they are voluntarily choosing FDCs. Employers argue that workers would prefer FDCs, even if factories comply with the law during closings, because workers are attracted by the 5% severance guaranteed to them under FDCs regardless of whether they complete their contracts. However, according to the representative from Voice of Workers, in most cases where workers express a preference for FDCs because of the 5% severance, management has confused the workers about the actual terms of their contracts:

Usually, the management tries to cheat the workers by telling them that if they change their contracts to FDCs, they will get 5% severance. The management tells them that if they stay on UDCs and resign, they will not get anything. The employer tries to confuse the employee. Most of the garment workers are very uneducated and most don't know anything about the law, so it is easy for the management to confuse them. Most workers are not aware of which kind of contract they are on. The management just calls the worker in to provide a thumbprint on a contract. The workers don't know what the contract is about.¹⁰⁰

The representatives from WAC echoed this skepticism about workers understanding the benefits and drawbacks of selecting one contract over another. According to one of the WAC representatives interviewed, “workers on UDCs who agree to switch to FDCs because they are promised 5% severance under FDCs don't understand the 5% severance propaganda,” and workers who say they would prefer FDCs over UDCs because of the promise of 5% severance “don't understand the long-term rights that come with UDCs.”¹⁰¹

If true, this claim contradicts employer arguments that workers prefer FDCs because of the 5% severance benefit; it would indicate that workers are not fully informed of the rights and benefits of the different types of

¹⁰⁰ Ibid.

¹⁰¹ Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

labor contracts. According to a consultant to Better Factories Cambodia, only union leaders and shop stewards seem generally to understand the difference between FDCs and UDCs. When ILO monitors ask workers about their terms of employment, how their wages are calculated, and what their rights and benefits are under their contracts, “it’s not uncommon to see that they don’t really understand the terms and conditions of their contracts.”¹⁰²

It is clear from the Clinic’s interviews with unions, labor activists, and international experts that employers’ claims that workers actually prefer FDCs are in dispute. Overwhelming evidence illustrates the two ways, discussed above, in which workers’ preferences for FDCs may not be informed or voluntary, leading the Clinic to conclude that most workers do not genuinely prefer FDCs.

3. The Existing Labor Law Clearly Prohibits the Indefinite Renewal of FDCs

Unions, legal experts, and even some members of the Ministry of Labor challenge the employers’ claim that the Arbitration Council failed to interpret the Labor Law accurately when it read the Article 67(2) two-year limit on FDC renewals as applying to the entire employment relationship and not to each individual FDC. While employers argue that the Arbitration Council’s interpretation of the law is problematic because the law is vague and needs clarification, union leaders argue that the law needs official clarification because employers and some members of the Ministry of Labor choose to interpret it differently from the Arbitration Council in order to undermine its enforcement. According to a leader of the Cambodian National Labour Confederation (“CNC”), “the current Labor Law, as interpreted by the ILO and the Arbitration Council, made sense,” but the problem was that “some Labor [Ministry] officials were interpreting it in a different way, changing ‘the renewal’ to ‘each renewal.’”¹⁰³ A CLUF leader voiced a similar position, stating that opposition by the Ministry of Labor and the GMAC to the Arbitration Council’s interpretation has created many problems for the enforcement of the law.¹⁰⁴ The Lowenstein Clinic had the opportunity to speak with several legal experts from the Arbitration Council Foundation. An expert from the Foundation emphasized that the Arbitration Council has been clear and consistent in its interpretation of Article 67 since 2003 and that its inter-

¹⁰² Lowenstein Clinic Interview with a labor law consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁰³ Lowenstein Clinic Interview with a CNC union leader, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁰⁴ Lowenstein Clinic Interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

pretation was informed by both a study of the background to the drafting of the 1997 Labor Law and ILO jurisprudence.¹⁰⁵

The Director General of the Ministry of Labor, Seng Sakda, observed that there are government officials who agree with the Arbitration Council's interpretation of the law. According to Mr. Sakda, one of the original drafters of the Labor Law is among those in the Ministry of Labor who interpret Article 67 in congruence with the Arbitration Council.¹⁰⁶ Mr. Sakda himself also spoke in favor of the Arbitration Council's interpretation of the law, sharing with the Clinic his personal view that after two years of employment in a factory, workers should be put on UDCs: "I support the workers' position," he said, "because two years on FDCs is long enough [for an employer] to learn the advantages and disadvantages of a worker."¹⁰⁷

C. Problems with FDC Use That Affect All Sides

As the preceding analysis indicates, there is disagreement between garment manufacturers, on the one hand, and labor unions and NGOs, on the other, about: whether FDCs are necessary to keep the industry competitive; whether workers prefer FDCs; and whether the Labor Law requires clarification. The Clinic's research points strongly to the following conclusions: (1) The Labor Law already provides adequate flexibility to employers. (2) Workers do not prefer FDCs. (3) The Labor Law has already been clearly and sensibly interpreted by the Arbitration Council. Nevertheless, these issues remain in dispute.

The Clinic's research makes some problems related to FDCs clear. These problems should concern all stakeholders because of the detrimental effects that the continued liberalization of FDC use can have on Cambodia's position in the global marketplace. These effects include possible damage to industrial relations, a diminished ability to compete against countries with more mature workforces, and the reputational harm Cambodia may sustain as a result of the step backward that easing restrictions on the use of FDCs would represent.

1. FDCs Might Undermine Industrial Relations

The interests of garment manufacturers, the government, and buyers clearly converge around the importance of peaceful industrial relations.

¹⁰⁵ Lowenstein Clinic Interview with legal experts from the Arbitration Council Foundation, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁰⁶ Lowenstein Clinic Interview with Seng Sakda, Director General of the Ministry of Labor, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁰⁷ Ibid.

An ILO-BFC consultant described the threat of strikes as “a huge concern” for both factories and the government and expressed a belief that this threat would increase as factories accelerate their move to FDCs.¹⁰⁸ According to the ILO-BFC consultant, it is “pretty predictable” that “with increased use of FDCs and a decline in employment security, there may be greater unrest among the workers,” which results in “more potential for strikes.”¹⁰⁹ This consultant described the importance to buyers of peaceful industrial relations, saying that “for buyers, it’s all about reducing risk” and that frequent strikes “may be the huge black spot on Cambodia’s reputation.”¹¹⁰ While buyers have expressed concern that the proposed amendment to the Labor Law might have the effect of restricting workers’ rights, it is also likely that part of the reason buyers have opposed the amendment is their fear that the increased use of FDCs will damage industrial relations within factories and lead to strikes.

If buyers are concerned about the potential for strikes, and if the government and factory management are concerned that fear of strikes will lead buyers to move their orders to countries with more peaceful industrial relations, the question then is whether putting more workers on FDCs would actually lead to more strikes. The Clinic’s interviews with NGOs, unions, and labor experts suggest that it could. One of the WAC representatives told the Clinic that there has recently been “a large number of demonstrations and strikes” by workers who had been changed from UDCs to FDCs.¹¹¹ The Voice of Workers representative interviewed by the Clinic described how workers at Flying Dragon went on strike for two months when management tried to change all the workers from UDCs to FDCs.¹¹² An ILO-BFC consultant said that in response to the proposed amendment, “the unions have spoken out and said that they would go on a massive strike.”¹¹³

Experience with past strikes has made both the government and factory management particularly anxious about the potential for future labor unrest. Factory management interviewed by the Clinic in 2009 expressed concern that more strikes could cripple the industry. Mr. Takan of Grandtex

¹⁰⁸ Lowenstein Clinic Interview with a labor law consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

¹¹² Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009.

¹¹³ Lowenstein Clinic Interview with a labor law consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

described how “a worker strike can cause an entire factory to close,”¹¹⁴ and Mr. Tan of Ocean Sky admitted that the major issue factory management faces now is “improving industrial relations”¹¹⁵ as workers threaten unrest.

In September 2010, management’s fears were realized when nearly two-thirds of the country’s garment workers went on a four-day national strike over wages and working conditions. The Clinic’s 2009 interviews with union leaders and labor law experts suggest that the possibility of additional widespread strikes is plausible if the Labor Law is modified to facilitate the use of FDCs. A CCTU union leader was hesitant even to speculate about the repercussions if the Amendment were passed: “My estimation is that if the amendment is passed, workers won’t stay still. They will rise up and struggle for their rights. The government is afraid of the impact of strikes.”¹¹⁶ A C.CAWDU leader interviewed by the Clinic echoed this concern, saying, “if the proposed amendments are successful, there will be a lot of strikes.”¹¹⁷ One of the union leaders at the CNC also said that unions were threatening “a nation-wide strike if the government doesn’t listen on this issue.” Now the unions have shown their capacity to orchestrate such a strike. How the experience of the September 2010 strikes will affect the likelihood that the unions would use the tactic again in the future is uncertain, but the threat of economically disruptive labor unrest is clearly real.

The Clinic learned that labor relations can improve when factories limit their use of FDCs. Theoun Kong, the Compliance Officer at SL Cambodia – one of only two factories in Cambodia to have 100% of its workforce on UDCs – told the Clinic that he believed SL Cambodia’s preference for UDCs contributed to the good relationship between the management and workers in the factory. Mr. Theoun said that in his three years at SL, they had “never had a problem with strikes” because “the workers are happy.”¹¹⁸ Mr. Theoun told the Clinic that when SL has hired workers, none of them have ever asked for an FDC, and “if the workers are on UDCs and their UDCs are suddenly changed to FDCs, they may not be happy.”¹¹⁹ A represen-

¹¹⁴ Lowenstein Clinic Interview with Ravind Takan, Compliance Officer for Grandtex, Phnom Penh, Cambodia, Mar. 20, 2009.

¹¹⁵ Lowenstein Clinic Interview with Albert Tan, Regional Vice-President for Ocean Sky and Treasurer of the GMAC, Phnom Penh, Cambodia, Mar. 21, 2009.

¹¹⁶ Lowenstein Clinic Interview with a CCTU union leader, Phnom Penh, Cambodia, Mar. 19, 2009.

¹¹⁷ Lowenstein Clinic Interview with a C.CAWDU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹¹⁸ Lowenstein Clinic Interview with Thoeun Kong, Compliance Officer at SL Cambodia, Phnom Penh, Cambodia, Mar. 20, 2009.

¹¹⁹ *Ibid.*

tative from the CLUF told the Clinic that the union successfully negotiated a collective bargaining agreement (“CBA”) with a factory by persuading the management that abiding by the two-year limit on FDCs “would produce industrial peace, not strikes.” The CLUF representative said that since the CBA was concluded, there has indeed been “greater industrial peace” in that factory.¹²⁰

2. FDCs Make Cambodia Less Competitive

Although garment manufacturers in Cambodia argue that they need to have greater freedom to keep workers on FDCs in order to stay competitive with factories working in countries with lower labor costs, their argument fails to address a root cause of the higher production costs: the lower productivity of factories in Cambodia compared to factories in other countries. The U.S. Embassy’s labor expert stressed the need for increased productivity, saying that “Cambodia needs to increase its productivity level” and that “infringing upon labor rights will set Cambodia back economically.”¹²¹ The expert also said there may be a connection between the increased use of FDCs and decreased productivity in the Cambodian garment sector “because [low] productivity is connected to the lack of job training, the decreased investment in human capital, foreign supervisors, and worker turnover.”¹²² Evaluating the impact of different labor-contract regimes on the labor productivity of a workforce requires empirical analyses that are beyond the scope of this report. However, expert assessments of the main obstacles to increased productivity in the Cambodian garment sector support the conclusion that widespread use of FDCs can negatively affect productivity.

According to the Garment Industry Productivity Center (“GIPC”), a USAID-sponsored program in Cambodia devoted specifically to increasing the productivity of the Cambodian garment industry, one of the biggest factors in Cambodia’s lack of productivity is that “[m]iddle management (i.e., supervisors) needs to be of a higher caliber.”¹²³ To strengthen Cambodia’s force of middle managers, the GIPC believes, “[o]n-the-job and online training for supervisors and managers is essential.”¹²⁴ However, with more work-

¹²⁰ Lowenstein Clinic Interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹²¹ Lowenstein Clinic Interview with a U.S. Embassy labor expert, Phnom Penh, Cambodia, Mar. 17, 2009.

¹²² Ibid.

¹²³ GIPC Report, *Measuring Competitiveness and Labour Productivity in Cambodia’s Garment Industry*, at p. 32 (June 2005).

¹²⁴ Ibid.

ers on short-term contracts, fewer workers are left on contracts that foster the long-term relationship with a factory necessary to obtain training to move up the company ladder. The current structure of the industry makes the kind of training described by the GIPC nearly impossible; thus, it precludes the possibility that Cambodian workers could become middle managers. The GIPC has reported that in “critical middle management positions” in Cambodian garment factories, “84 percent of production planners are foreign,” as are “54 percent of line supervisors.”¹²⁵ These numbers illustrate the problem with the Cambodian garment industry’s failure to train local workers to take on supervisory roles within the production process – a problem that is likely to persist if the industry continues to structure itself in such a way that Cambodian workers remain in unskilled, low-level positions on short-term contracts.

Garment manufacturers are aware that productivity is a problem and agree that a necessary solution to that problem is training more Cambodian workers for positions in middle management. Kaing Monika of the GMAC told the Clinic that garment manufacturers in Cambodia know that they have lower productivity than factories in Vietnam and China and that to compete with those countries, they will have to improve on that front.¹²⁶ Mr. Monika recognized that high worker turnover affects productivity, adding: “To increase productivity in the factories, we need to train the workers. Reducing turnover is important. We have quite a new workforce, and our industry is quite young compared to China and Vietnam.”¹²⁷ Mr. Monika also told the Clinic that “few” line managers are Cambodian and that, at the moment, Cambodian factories were employing “a lot of line managers from China.”¹²⁸ Mr. Monika acknowledged that increasing productivity “may involve making more Cambodians line managers.”¹²⁹

The GMAC, the U.S. Embassy, and the GIPC agree that increased productivity is necessary to keep Cambodian garment factories competitive. They also agree that making factories competitive requires investing in the development of the Cambodian labor force. Mr. Monika’s acknowledgement that it would take about a year to train someone to become a line manager¹³⁰ highlights the potential conflict between the increased use of short-term con-

¹²⁵ Ibid. at p. 33.

¹²⁶ Lowenstein Clinic Interview with Kaing Monika, Business Development Manager for the GMAC, Phnom Penh, Cambodia, Mar. 17, 2009.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

tracts and the need to build longer-term, continuous relationships between workers and factories if Cambodia is going to compete successfully with Vietnam and China.

3. FDCs Hurt Cambodia's Reputation

Major buyers . . . released a letter . . . expressing concern that the draft amendments to the Labor Law could affect “Cambodia’s image as a sourcing country with high labor standards.”

In the debate over whether FDCs are good for the garment industry and desirable for workers, another factor is whether Cambodia is sustaining reputational harm as a result of the move toward FDCs. As the above analyses of international labor standards and domestic law enforcement indicate, the practice of categorizing regular workers as temporary workers by putting them on serially renewed short-term contracts contravenes both ILO standards and the Arbitration Council’s interpretation of the Cambodian Labor Law. For buyers and Cambodian trading partners, this causes deep concern. The U.S. Embassy labor expert informed the Clinic that embassy representatives met with senior Ministry of Labor leaders and expressed disapproval of the draft amendment.¹³¹ According to that expert,

The Embassy, which is concerned with good governance, democracy, and the rule of law, sees this as a grassroots democracy issue. . . . The U.S. Embassy’s message is: “Don’t move back on labor rights.” Labor rights are important for this emerging democracy and are Cambodia’s only niche with companies concerned with social responsibility.¹³²

Cambodian labor unions have written the Cambodian government in formal protest (discussed above in Subsection V.B.2). The International Textile, Garment & Leather Worker Federation (“ITGLWF”) and the International Trade Union Confederation have also sent letters to the government opposing the amendment.¹³³ The ILO did not issue an official letter to the

¹³¹ Lowenstein Clinic Interview with a U.S. Embassy labor expert, Phnom Penh, Cambodia, Mar. 17, 2009.

¹³² Ibid.

¹³³ Lowenstein Clinic Interview with Veasna Nuon, National Coordinator of the ILO-WEP,

Cambodian government but has notified the government that it opposes the amendment.¹³⁴

Major buyers have also raised the issue with the government. Business for Social Responsibility (“BSR”), a corporate social responsibility group, released a letter on March 3, 2009 on behalf of buyers that included Gap, Levi Strauss, and Wal-Mart, expressing concern that the draft amendments to the Labor Law could affect “Cambodia’s image as a sourcing country with high labor standards.” The letter also warned that “the unrestricted use of short-term contracts could have the consequence of jeopardizing protections granted to workers under unlimited-term contracts, such as the ability to join unions, voice concerns to employers, and be ensured freedom from discrimination.”¹³⁵

Cambodia has indicated that it would enter into a future free trade agreement with the United States that incorporates a commitment to high labor standards,¹³⁶ and it is clear that the Cambodian government is interested in preserving its reputation for protecting workers’ rights. A consultant from the ILO-BFC emphasized that the Cambodian government seems to care about its image with respect to good working conditions and that the proposed amendment to the Labor Law “might tarnish [Cambodia’s] image or reputation by putting something into play that might violate international standards.”¹³⁷

The Cambodian government is committed to upholding its reputation as a rights-respecting state, and buyers, key trading partners, and international organizations have expressed concern about the increasing use of FDCs in the Cambodian garment industry. This context requires the Cambodian government to seriously consider whether liberalizing the regulations on the use of FDCs is worth the reputational harm it might cause.

Phnom Penh, Cambodia, Mar. 16, 2009.

¹³⁴ Ibid.

¹³⁵ Letter from Business for Social Responsibility to H.E. Sar Kheng, Deputy Prime Minister and Co-Minister, Ministry of Interior, H.E. Cham Prasidh, Senior Minister/Minister, Ministry of Commerce, H.E. Ith Sam Heng, Chair, 8th Working Group on Labor & H.E. Vong Soth, Minister of Labor, Mar. 3, 2009 (on file with the Clinic). Business for Social Responsibility (BSR) is a global organization that works with more than 250 member companies to develop sustainable business strategies and solutions. BSR released this letter on behalf of seven companies: Cold Water Creek Inc., Gap Inc., Jones Apparel Group, Levi Strauss & Co., Nike, Phillips-Van Heusen, and Wal-Mart.

¹³⁶ Lowenstein Clinic Interview with a U.S. Embassy labor expert, Phnom Penh, Cambodia, Mar. 17, 2009.

¹³⁷ Lowenstein Clinic Interview with a labor law consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

D. Regulation of FDCs – The Situation in Cambodia and Competitor Countries

1. Limiting FDCs to Temporary Work

Cambodia’s Labor Law does not restrict the type of work that can be performed under FDCs. This is in contrast to some of its competitor countries, which permit FDCs only for temporary work.¹³⁸ Pakistan, for example, limits FDCs to “work of an essentially temporary nature that is likely to be finished within a period not exceeding nine months.”¹³⁹

Other countries restrict the use of FDCs even further by providing enumerated lists of permissible types of labor. Indonesia, for example, restricts FDCs to: (a) work “completed at one go” or work that is temporary in nature; (b) work on a particular job or project estimated to take no more than three years to complete; (c) seasonal work; and (d) work that is related to

a new product still in its experimental stage.¹⁴⁰ By limiting the use of FDCs to work that is temporary or seasonal, countries like Pakistan and Indonesia have taken steps to protect against employing a more or less permanent workforce entirely on short-term contracts. As indicated earlier, a GMAC representative and ILO consultants told the Clinic that FDCs should not be used for employees who are essentially permanent workers, both in the type of labor they perform and in the relationship they have with the employer.¹⁴¹

If Cambodia adopts the amendment to Article 67 in its current form, it will have placed significantly fewer restrictions on the duration and renewal of FDCs than some of its most important competitors.

¹³⁸ Although Article 9 of the Cambodia Labor Law defines casual workers as those contracted to perform “specific work that shall normally be completed within a short period of time” or work that will be performed only “temporarily, intermittently and seasonally,” there is no evidence that this provision has been invoked to restrict employers’ use of FDCs to work that is, in fact, temporary in nature.

¹³⁹ ILO Industrial and Employment Relations Department, Profiles of National Legislation Covering Termination of Employment: Pakistan, <http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/pakistan.htm#2> (last visited May 2, 2010).

¹⁴⁰ Act No. 13 of the Republic of Indonesia, “Concerning Manpower,” art. 59(1) (2003), available at <http://www.ilo.org/dyn/natlex/docs/SERIAL/64764/56412/F861503702/idn64764.PDF>.

¹⁴¹ Lowenstein Clinic Interview with Kaing Monika, Business Development Manager for the GMAC, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with a labor law

Pakistan's and Indonesia's limitation of FDCs to temporary work indicates that Cambodia offers less protection against misusing FDCs to employ permanent workers than even some of its lower-cost competitors.

2. Limiting the Duration and Renewal of FDCs

The proposed amendment to Article 67 would allow an employer to renew an FDC an unlimited number of times. Some of Cambodia's competitors, on the other hand, limit both the duration of an FDC and the number of times an FDC can be renewed. Indonesia, for example, limits FDCs to a period of two years, with the possibility of extending once for an additional year.¹⁴² Vietnam – another of Cambodia's main competitors – limits FDCs to a period of 12-36 months, with the possibility of only one extension for a maximum of one additional year.¹⁴³

Even the most dominant player in the garment industry, China, restricts the number of times an FDC can be renewed. In China, if an FDC is renewed “after the consecutive conclusion of two fixed term labor contracts” and the worker has not engaged in serious misconduct, then the FDC will be construed as a UDC.¹⁴⁴ If Cambodia adopts the amendment to Article 67 in its current form, it will have placed significantly fewer restrictions on the duration and renewal of FDCs than some of its most important competitors.

3. Conversion of FDCs into UDCs

Article 67 of the Labor Law currently stipulates that any extension beyond the two-year limitation on FDCs converts the contract into a UDC. The proposed amendment would eliminate this restriction. As a result, the amended Labor Law would contain no provision for converting FDCs to UDCs based on either the duration of the FDC or the number of FDC renewals. Adopting the amendment would, therefore, leave Cambodia with a labor law regime that affords significantly less protection to FDC workers than Cambodia's competitors provide. In Vietnam, for example, although the law does not require that an FDC exceed a certain number of years in order to be

consultant to the ILO-BFC, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁴² Act No. 13 of the Republic of Indonesia, “Concerning Manpower,” art. 59(4) (2003), available at <http://www.ilo.org/dyn/natlex/docs/SERIAL/64764/56412/F861503702/idn64764.PDF>.

¹⁴³ Vietnam Labor Code, art. 27, available at <http://www.congdoanvn.org.vn/english/details.asp?l=1&c=242&c2=242&m=269>.

¹⁴⁴ Labor Contract Law (P.R.C.), art. 14, item 1, translated in Baker & McKenzie, *Key Workplace Documents: Law Firms* (2007), available at <http://digitalcommons.ilr.cornell.edu/law-firms/23/>.

converted, it stipulates that if parties extend an FDC more than once, it will be construed to be a UDC.¹⁴⁵ In the Philippines, if an employee works on an FDC for more than one year, continuously or not, it automatically becomes a UDC.¹⁴⁶

China allows the use of FDCs for a longer period than other countries but still provides an outer limit. Cambodia, if the proposed amendment is adopted, would not. China requires that the contract of an employee who has worked for an uninterrupted term of ten years under an FDC be automatically converted to a UDC unless the worker chooses to continue working on an FDC.¹⁴⁷ If Cambodia were to adopt the proposed amendment, an employee could be employed on successively renewed FDCs for an indefinite period of time. That would fall below the standard of protection found in China's requirement that FDCs be converted into UDCs after ten years or two consecutive renewals, as well as the conversion standards of a number of Cambodia's other competitor countries.

4. Calculating Duration of Service

Article 73 of the Cambodian Labor Law provides that the seniority of workers whose FDCs are converted to UDCs should be calculated based on their entire length of service. The Labor Law, however, does not provide that the seniority (and benefits that accrue only after a certain period of continuous service) of workers hired on successive FDCs must be calculated according to the combined duration of all of their contracts. In contrast, some of Cambodia's main competitors provide such protections by explicitly stipulating that workers' benefits should be calculated in the aggregate, without requiring that the service be "continuous," as Cambodia requires. In Honduras, for example, if a worker has been employed under more than one FDC, her benefits will be counted starting from when she first worked for the

¹⁴⁵ Vietnam Labor Code, art. 27, available at <http://www.congdoanvn.org.vn/english/details.asp?l=1&c=242&c2=242&m=269>.

¹⁴⁶ The Labor Code of the Philippines, Pres. Dec. No. 442, Book VI, art. 280, available at <http://www.chanrobles.com/legal4labor6.htm>. For an example of another country with law that provides for converting FDCs to UDCs, see Section 25 of the Dominican Republic's Labor Code (LC), which provides that "contracts entered into for a given time which are concluded for the purpose of evading the provisions of the LC will be deemed to be for an indefinite period." ILO Industrial and Employment Relations Department, Profiles of National Legislation Covering Termination of Employment: Dominican Republic, <http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/dr.htm> (last visited May 2, 2010).

¹⁴⁷ Labor Contract Law (P.R.C.), art. 14, item 1, translated in Baker & McKenzie, *Key Workplace Documents: Law Firms* (2007), available at <http://digitalcommons.ilr.cornell.edu/law-firms/23/>.

employer, not from when the last FDC was signed.¹⁴⁸ In Thailand, the government determines whether an employer used successive short-term contracts to avoid paying benefits owed to workers who have been employed continuously. Thai law provides that when an employer deliberately disrupts an employee's continuous work in order to deprive the employee of her rights, the government will calculate the employee's length of employment based on the aggregate time of service.¹⁴⁹ Thus, Cambodia's Labor Law provides fewer protections against the miscalculation of an employee's duration of service than several of its competitors, including Honduras and Thailand.

5. Penalty for Failure to Convert FDCs to UDCs

Although Article 67 of the Cambodian Labor Law currently provides for the automatic conversion of FDCs to UDCs after two years, it does not impose any penalty if an employer fails to carry out such a conversion. In contrast, China imposes penalties on employers for failing to convert FDCs to UDCs when they are required by law to do so. China's 2007 Labor Contract Law stipulates that if the employer fails to convert an FDC to a UDC when required by law, the employer must "pay the laborer twice the amount of the original labor remuneration from the date when the non-fixed labor contract should have been signed."¹⁵⁰ Thus, Chinese law, by imposing penalties for failure to convert FDCs to UDCs, provides greater protection against the unlawful extension of employment under FDCs than Cambodian law does.

E. Conclusions About the Effects of FDCs

Although Cambodian garment manufacturers believe that increasing the use of FDCs will help them stay competitive with lower-cost manufacturers in other countries, the Clinic's research indicates that FDCs are unlikely to achieve this goal. Garment manufacturers say that they need FDCs for several reasons and that workers prefer them, but the Clinic has uncovered no reason that a factory would need to have 100% of its workforce on FDCs, as many factories currently do. Indeed, some of Cambodia's biggest competitors, including China, Vietnam, and Bangladesh, place greater restrictions on the use of FDCs than Cambodia does. These include restrictions on: the type

¹⁴⁸ Honduras Labor Code, art. 47; see also Workers Rights Consortium Memorandum, *Memo re Annual Liquidation* (on file with Clinic).

¹⁴⁹ Labour Protection Act of Thailand, B.E. 2541, at § 20 (1998), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/49727/65119/E98THA01.htm>.

¹⁵⁰ Labor Contract Law (P.R.C.), art. 82, translated in Baker & McKenzie, *Key Workplace Documents: Law Firms* (2007), available at <http://digitalcommons.ilr.cornell.edu/lawfirms/23/>.

of work permitted under FDCs; the number of FDC renewals permitted for a worker; the conditions under which FDCs must be converted into UDCs; and the calculation of service based on aggregate service. China also imposes penalties on employers for failing to convert FDCs to UDCs. The Clinic's research also indicates that workers do not prefer FDCs.

Rather than helping to keep the Cambodian garment industry competitive, the widespread use of FDCs threatens the basic integrity of the industry. Increasing the use of FDCs increases worker insecurity, which decreases the potential for collective bargaining and peaceful industrial relations and limits the ability of workers to

enjoy their basic rights under domestic and international law. This, in turn, threatens Cambodia's reputation as a country that is seeking to improve conditions for workers. Such reputational harm further decreases the competitiveness of the garment industry, since Cambodia's good reputation serves as its main competitive advantage over lower-cost competitors.

The widespread use of FDCs . . . threatens Cambodia's reputation as a country that is seeking to improve conditions for workers.

VI. Workers' Accounts – How FDCs Affect Their Lives

This part explores Cambodian garment workers' perspectives on the arguments that have been made for and against FDCs and considers the ways in which FDCs are affecting workers' lives. Based on the Lowenstein Clinic's interviews with workers themselves, this part considers how concerns related to violations of domestic and international law are already playing out in the lives of Cambodian garment workers.

A. Employers Do Not Give Workers a Real Choice

Based on the Clinic's interviews, it appears that Cambodian garment workers are not voluntarily choosing to switch from long-term contracts to short-term contracts. Instead, the shift to FDCs appears to be driven by the preferences of factory managers and owners. The current trend in the Cambodian garment industry is for factories to hire exclusively on a short-term basis, with many factories having completely abandoned the UDC as a contractual option for workers. Although some of the factory management interviewed by the Clinic claimed that they provided workers with a choice between UDCs and FDCs when hiring, none of the garment workers interviewed by the Clinic said they had received such a choice. Most workers stated that they would have preferred UDCs but felt they had no option: It was either an FDC or no job at all.¹⁵¹ The Lowenstein Clinic has found only two factories in the country – SL Cambodia and E Garment – that have all of their workers on UDCs.

The Clinic's research also indicates that many of the so-called "new" FDC hires are not new hires at all. Rather, factories have employed a variety of deceitful and possibly illegal methods to reclassify existing UDC workers as new FDC hires. In some cases, factories have converted their entire existing workforces from UDCs to FDCs. One tactic that factory management has used to enact mass contract conversions is to coerce garment workers into switching their contracts just before Pchum Ben, a national Cambodian holiday. For Pchum Ben, workers generally need extra money to travel back to their homes, which are often in the countryside.¹⁵² Factory management has

¹⁵¹ Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with New Wide Factor Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #2, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #8, Phnom Penh, Cambodia, Mar. 20, 2009.

¹⁵² The Cambodian government takes very seriously the ability of workers to return home with pay for the Pchum Ben holiday. In 2005, for example, Minister Nhep Bunchin (Ministry of Labor) issued a notification to all employers covered by the Labor Law requiring not only that they give workers paid vacation for the Pchum Ben holiday, but also that they advance

used this opportunity to call workers into the factory office, one by one or in pairs, and offer them a little extra money if they agree to switch their UDCs to FDCs. Factory management has also threatened to withhold altogether the money workers typically receive to travel home, if workers do not agree to convert to FDCs.¹⁵³

Another tactic that factory owners use to achieve mass workforce reclassification is to stage false factory shutdowns, terminate all the current UDC employees, and reopen with only FDCs available to workers looking to be “rehired.” In some instances, factories have closed for a nominally short period and reopened under a new name, claiming to be operating under new management.¹⁵⁴ In other instances, the management has simply told workers that the ownership or management has changed and that all previous contracts are terminated, requiring employees to sign or thumbprint new FDCs on the spot. In such cases, the management issues new ID cards the same day without even stopping the production process.¹⁵⁵ Management have, in some cases, relocated the factory or changed the owners’ names to make the shutdown appear legitimate,¹⁵⁶ making it difficult for monitors to determine whether factories are abiding by the Labor Law’s regulations for factory closings.

Employers also use so-called “yellow” unions – unions that receive financial support from the government or employers for advocating positions favorable to manufacturers, instead of workers – to convert workers on UDCs to FDCs. In some instances, the yellow unions encourage workers to convert to FDCs by misrepresenting to them the rights and benefits of each type of contract. In other instances, particularly in the factories where only yellow unions are represented,¹⁵⁷ yellow unions may enter into collective bargaining agreements with factory management on the workers’ behalf, switching them from UDCs to FDCs without the workers’ knowledge. The yellow unions

them their salaries prior to the holiday. Ref. No: 1316, Ministry of Labor, Sept. 15, 2005.

¹⁵³ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #3, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #4, Phnom Penh, Cambodia, Mar. 20, 2009.

¹⁵⁴ Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with an FTUWKC union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁵⁵ Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁵⁶ Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁵⁷ In Cambodia, there is often more than one union operating in the same factory.

usually do so in exchange for bribes.¹⁵⁸ Factories are then able to purge any remaining UDC workers by continually suspending them until they have no choice but to resign.¹⁵⁹

When converting workers from UDCs to FDCs, the management often employs heavy psychological pressure and misinformation to confuse the workers. Management sometimes takes one or two workers into the factory office at a time and tells them that all of the others have already changed their contracts to FDCs and that only they are holding out.¹⁶⁰ Management also takes advantage of the fact that most workers have a very low level of education and many are illiterate; many workers place their thumbprint on a contract without having the contract read to them, and many of the workers interviewed by the Clinic did not have copies of their contracts.¹⁶¹ Workers often do not know what they are agreeing to. For example, management can tell the workers that they agreed to a contract's terms, including the end date, but the workers have no way of confirming the information. This leaves them entirely at the mercy of their employers.

Workers have practically no bargaining power because they know that if they go elsewhere the conditions would be the same: most factories hire solely with FDCs.¹⁶² Some workers reported that when they refused to sign agreements converting their UDCs into FDCs, their only option was to resign, which they did.¹⁶³ This does not mean that there are no workers who prefer FDCs,¹⁶⁴ but based on the Clinic's interviews, it appears that the vast

¹⁵⁸ Lowenstein Clinic Interview with a representative from Voice of Workers, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁵⁹ Lowenstein Clinic Interview with Bloomtime Factory Worker #1, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #2, Phnom Penh, Cambodia, Mar. 20, 2009.

¹⁶⁰ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁶¹ *Ibid.*; Lowenstein Clinic Interview with a FTUWKC union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #3, Phnom Penh, Cambodia, Mar. 20, 2009.

¹⁶² Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁶³ See, for example, Lowenstein Clinic Interview with Bloomtime Factory Worker #1, Phnom Penh, Cambodia, Mar. 20, 2009.

¹⁶⁴ Lowenstein Clinic interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009 (stating that there are still some workers who prefer FDCs because of the 5% severance pay).

majority of workers do not. Indeed, some of the workers interviewed by the Clinic expressed a preference for UDCs for precisely the reasons described above, in Subsection IV.A.3.b, concerning the ease of termination and non-renewal with FDCs. These workers said that they would prefer UDCs because on FDCs, they risk not having their FDCs renewed if they complain, demand anything, or oppose their employers at all.¹⁶⁵

B. Employers Use FDCs as a Union-Busting Tool

Many sources interviewed mentioned that the use of FDCs has made it easier for employers to discriminate against unions and retaliate against labor organizers.¹⁶⁶ As described earlier, in Section IV of this report, the use of FDCs to discriminate against unions is a direct violation of the right to freedom of association protected under both Cambodian and international law. Based on the Clinic's interviews, there appear to be several ways in which employers use FDCs to unlawfully suppress union activity.

1. FDCs Increase Workers' Fear of Non-renewal

As the above discussion of FDC termination and non-renewal indicates, the use of FDCs decreases job stability for garment workers and increases workers' fears that they will be terminated or not renewed if they fail to comply with their employers' demands in any way. As a result, FDCs make garment workers fear for their jobs if they join a union. Many garment workers expressed to the Clinic their reluctance to join unions, saying that they had refrained from doing so out of fear that their FDCs would not be renewed if they joined.¹⁶⁷ One worker told the Clinic that, although she wanted to join a union, she was worried that if she became a union member, her contract might not be renewed.¹⁶⁸ Another worker stated that factory

¹⁶⁵ Lowenstein Clinic Interview with New Wide Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with New Wide Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁶⁶ See, for example, Lowenstein Clinic interview with a CNC union leader, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with MSI Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁶⁷ Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with MSI Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁶⁸ Lowenstein Clinic Interview with New Wide Factory Worker #5, Phnom Penh, Cambodia, Mar. 16, 2009.

management clearly informed workers that if they joined a union, they would not have their contracts renewed.¹⁶⁹

The Clinic's interviews with workers made it clear that UDC workers are much less afraid to join unions, because of the increased job security associated with UDCs and the protections against termination that UDC workers enjoy. One worker said that FDC workers are so worried about having their contracts renewed that they believe joining a union is a risk they cannot take; as a result, workers on UDCs are much more willing than workers on FDCs to join unions.¹⁷⁰

2. FDCs Hinder Union Formation

The move toward FDCs makes it increasingly difficult to form and maintain unions, particularly in factories that have terminated or converted all UDC workers and replaced them entirely with FDC workers. One impediment to union formation is the fear of termination or non-renewal. One union leader told the Clinic that his union had tried to organize in some factories where all the workers were on FDCs, but the workers were too scared to join.¹⁷¹ FDCs also pose a practical impediment to union formation, because unions take time to set up. As one union leader told the Clinic, it is difficult for workers on three-month FDCs to spend two of those months forming the union and submitting the necessary documentation to the Ministry; after the union is finally formed, the workers who set it up would be employed by the factory for only one more month.¹⁷²

FDC workers are so worried about having their contracts renewed that they believe joining a union is a risk they cannot take.

Several union representatives also noted that FDCs make it particularly difficult to ensure leadership stability for each factory.¹⁷³ Under Cambo-

¹⁶⁹ Lowenstein Clinic Interview with Pak Shun Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁷⁰ Lowenstein Clinic Interview with Top One Factory Worker #7, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁷¹ Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁷² Lowenstein Clinic Interview with an FTUWKC union leader, Phnom Penh, Cambodia, Mar. 18, 2009; see also Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁷³ Lowenstein Clinic interview with a CNC union leader, Phnom Penh, Cambodia, Mar. 19,

dian law, to become a local union president or vice president, a worker must have one year of work experience in the factory.¹⁷⁴ Moreover, union leaders are elected for two-year terms.¹⁷⁵ Since many factories now operate with nearly 100% of their workers on FDCs, and FDCs must necessarily be for durations not exceeding two years, workers are forced to elect union leaders whose contracts will expire before their union term of office ends. This dramatically reduces the efficacy of union leaders as agents of workplace change. When an FDC worker takes up a leadership position in her local union, her employer will often refuse to renew her contract when it expires. This means that the local union will be left with a leader who can no longer enter the factory that she is supposed to represent.¹⁷⁶ This clearly impairs her ability to advocate effectively on behalf of her fellow union members.¹⁷⁷

One garment worker said that after he restarted a union in his factory and became its local president, the employer notified him that the company was not going to renew his contract. After a union federation intervened on the worker's behalf, the employer decided to "suspend" the worker for an uncertain period of time, instead of taking the more definitive action of not renewing his contract. The worker had been employed on a three-month FDC, which had been renewed four times. All the union leaders in that factory were ousted or forced to resign. Now there are no union members left in the factory. The worker said that he has tried to maintain connections with the workers during his suspension but that it has been difficult because he has limited access to them. He said that if his suspension ends and he is allowed to return to the factory, he will keep trying to organize for the union.¹⁷⁸

3. FDCs Make Union Leaders Vulnerable to Retaliation

Interviewees said that factories retaliate against union leaders more often than against ordinary union members; several union representatives

2009; Lowenstein Clinic interview with a CLUF union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with MSI Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁷⁴ Cambodia Labor Law, art. 269(4).

¹⁷⁵ Prakas No. 305, *The Representativeness of Professional Organizations of Workers at the Enterprise or Establishment Level and the Right to Collective Bargaining for the Conclusion of Collective Agreements at that Level*, art. 3 (Nov. 11, 2001).

¹⁷⁶ Although it is technically possible that the union leader's FDC would be renewed, her FDC most likely would not be, because factory management in Cambodia generally takes steps to weaken union power.

¹⁷⁷ Lowenstein Clinic Interview with a CCTU union leader, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁷⁸ Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009.

mentioned mass firings of union leaders at factories.¹⁷⁹ A representative from the Free Trade Union of the Workers of the Kingdom of Cambodia (“FTU-WKC”) told the Clinic that at one factory, nine union leaders’ contracts were not renewed during the past year alone.¹⁸⁰ Union members from the same factory recounted a separate incident, in which, after learning who was elected to leadership positions in the most recent union elections, the factory gradually fired more than sixty union activists in several waves.¹⁸¹

These practices of intimidation and retaliation against union leaders who are working on FDCs stand in contrast to the treatment of union leaders working on UDCs. One worker told the Clinic that she had been at her factory for nine years; she was hired on a UDC and had not yet been forced to convert to an FDC. She currently serves as a union leader but said she never would have run for a leadership position had she been on an FDC. She said she knows that if she were on an FDC and in her current union role, her employer would not have renewed her contract.¹⁸²

4. FDCs Make Anti-Union Discrimination Harder to Prove

It is extremely difficult to hold employers accountable for anti-union discrimination against FDC workers. To prove anti-union discrimination, the worker bears the burden of presenting to the Arbitration Council a factual record that links a factory’s adverse employment action to the worker’s union activity. Factory managers are not likely to state explicitly that the reason a worker’s contract was not renewed was that he or she was a member of a union, which makes a claim of discrimination based on union activity difficult for the claimant to substantiate. Because FDC workers are often hired on contracts of very short duration, and because an employer does not need to provide any justification for not renewing a particular FDC upon its expiration, it is often impossible for the non-renewed FDC worker to establish the

¹⁷⁹ Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with an FTUWKC union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with E Garment Worker Factory #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with E Garment Worker Factory #2, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #3, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁸⁰ Lowenstein Clinic Interview with an FTUWKC union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁸¹ Lowenstein Clinic Interview with E Garment Worker Factory #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with E Garment Worker Factory #2, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #3, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁸² Lowenstein Clinic Interview with Top One Factory Worker #3, Phnom Penh, Cambodia, Mar. 18, 2009.

factual record necessary to prevail on an anti-union discrimination claim.¹⁸³

Members of the Arbitration Council Foundation confirmed that it is difficult to establish anti-union discrimination, in part because the initial burden of proof during proceedings is on the worker. Thus far, workers have not managed to prepare good cases to prove discrimination claims.¹⁸⁴

The difficulty of proving discrimination, combined with the time it takes for anti-union discrimination claims to be adjudicated, often leads workers to drop their claims, in many cases after a token cash payment from the defendant factory. Workers, unemployed and hoping for reinstatement, simply cannot afford to wait for the lengthy adjudication process to run its course.¹⁸⁵

C. Workers Need Labor Unions to Protect Their Rights

The use of FDCs to suppress union organizing and limit freedom of association is devastating to garment workers' ability to exercise their rights under the Labor Law. It was clear from the Clinic's interviews that unions in Cambodia play a vital role in worker education, in bringing complaints to factory management and the Arbitration Council, and in negotiating collective bargaining agreements with factory management. Where workers' freedom of association and access to unions are limited, workers are deprived of their ability to learn about, adjudicate, and negotiate their rights.

1. Workers Rely on Unions to Learn About Their Rights

Many workers are from the countryside, are not well educated, and lack the basic literacy necessary to read the Labor Law, let alone navigate its detailed provisions to learn about their rights.¹⁸⁶ Workers rely primarily on

¹⁸³ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁸⁴ Lowenstein Clinic Interview with legal experts from the Arbitration Council Foundation, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁸⁵ Lowenstein Clinic Interview with E. Garment Worker #3, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with a U.S. Embassy labor expert, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁸⁶ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009 (stating that workers generally do not understand the difference between FDCs and UDCs or know the consequences of signing FDCs); Lowenstein Clinic Interview with Veasna Nuon, National Coordinator of the ILO-WEP, Phnom Penh, Cambodia, Mar. 16, 2009 (stating that a regular worker probably would not understand his or her rights under the various types of contracts and that workers tend to leave it to the unions to fight for workers' rights, which is why worker education is so important); Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009 (stating that many workers on FDCs think that they are "temporary" workers and that they do not have many rights).

unions to educate them about their rights and how to protect them. One worker told the Clinic that she and other workers in her factory were forced to work overtime but, because they did not know they should file a complaint, had never complained about it.¹⁸⁷ Another worker said that because there were no training programs in her factory to educate workers about the differences between UDCs and FDCs, she did not understand the differences.¹⁸⁸ Another garment worker told the Clinic that her factory's management acknowledged that the reason it was not renewing her contract was that she was pregnant. She was a new worker, however, and did not know that she could file a complaint; so she did nothing. It was only after she had a discussion with a union representative that she learned she could have brought a pregnancy-discrimination claim.¹⁸⁹

What little information workers have about their rights they generally receive from unions. Because of the impediments FDCs pose to union formation and effective organizing, the move toward FDCs deprives workers of their primary source for learning about and standing up for their rights and, thus, makes them more vulnerable to exploitation and abuse.

2. Workers Rely on Unions to Bring Complaints

Unions are also essential to workers' ability to enforce their rights. It is through unions that workers bring both informal and formal complaints of violations to management, the Arbitration Council, and courts. Workers who want to complain informally to factory management have no bargaining power to make their voices heard.¹⁹⁰ According to representatives of one NGO interviewed by the Clinic, factory management is unlikely to hear individual complaints,¹⁹¹ so unions provide the key vehicle for workers to communicate their concerns to management. A garment worker who also served as the secretary for a union said that when workers have complaints, they go to unions to report them. Even workers who are not union members file complaints with the unions because there is no other channel through which

¹⁸⁷ Lowenstein Clinic Interview with E Garment Factory Worker #2, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁸⁸ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁸⁹ Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

¹⁹⁰ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁹¹ Lowenstein Clinic Interview with WAC representatives, Phnom Penh, Cambodia, Mar. 19, 2009.

individuals can bring complaints to the attention of management.¹⁹² One non-union worker told the Clinic that workers feel they cannot complain directly to management, and even FDC workers who have not joined unions seek help from unions to address their problems.¹⁹³

There is no effective legal mechanism through which individual garment workers can litigate complaints. According to ILO staff, to file an individual complaint, a worker must go first to the Ministry of Labor to seek conciliation; if she does not win a favorable result in conciliation, her only option to continue adjudicating her claim is to go to court.¹⁹⁴ The Clinic was repeatedly told, however, that the court system is not a viable option for workers. Litigation can drag on for years while cases are heard and appealed, a timeline that favors the employer, since the worker cannot survive, unpaid and awaiting reinstatement, for the length of time required to adjudicate a claim.¹⁹⁵ The court system has also been criticized by human rights groups for not being fully independent from the other branches of government.¹⁹⁶

The best option for workers to have their claims formally adjudicated is to take them to the Arbitration Council. Compared to the regular courts, the AC is a relatively efficient and independent body. The Arbitration Council, however, adjudicates only collective disputes. Although there is a process by which individual claims brought by non-union workers can be pooled by the Labor Ministry and forwarded to the AC, the unions play a vital role in documenting individual violations and collecting them for group arbitration.

Even workers who are not union members file complaints with the unions because there is no other channel through which individuals can bring complaints to the attention of management.

¹⁹² Lowenstein Clinic Interview with E Garment Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009.

¹⁹³ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009.

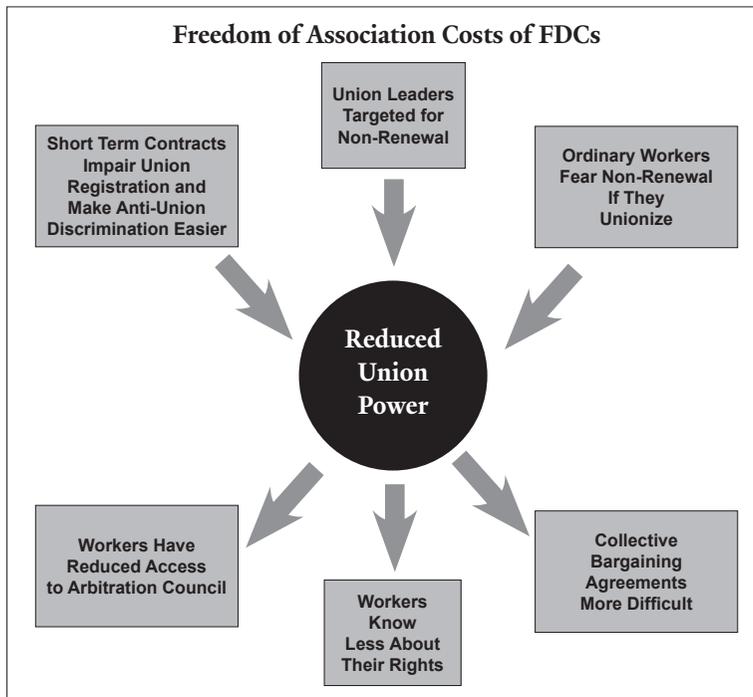
¹⁹⁴ Lowenstein Clinic Interview with an advisor to the ILO-DRP, Phnom Penh, Cambodia, Mar. 16, 2009.

¹⁹⁵ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009; Lowenstein Clinic Interview with Lean Chinda, labor law attorney, Phnom Penh, Cambodia, Mar. 18, 2009.

¹⁹⁶ See, for example, *Universal Periodic Review Submission: Cambodia*, Human Rights Watch, December 1, 2009, available at <http://www.hrw.org/en/news/2009/12/01/universal-periodic-review-submission-cambodia>.

3. Workers Rely on Unions to Negotiate Collective Bargaining Agreements

Unions are also necessary to the process of negotiation between management and labor. Collective bargaining agreements (“CBAs”) facilitate the cooperation between workers and managers that is necessary to improve industrial relations and avoid strikes. Negotiating a CBA is often the



most important step in a union’s work in a particular factory. As one worker told the Clinic, unions had not been very effective in her factory when they initially began organizing, but once a CBA was successfully negotiated, work conditions began to improve.¹⁹⁷

Workers can use CBAs to secure specific, enforceable promises from management, including promises to meet obligations that go beyond the requirements of the Labor Law. They can specify, for instance, that workers hired under successive FDCs shall not be disqualified from receiving benefits that accrue only after a certain period of “continuous” service. CBAs can also

¹⁹⁷ Lowenstein Clinic Interview with Top One Factory Worker #3, Phnom Penh, Cambodia, Mar. 18, 2009.

stipulate that workers will accrue seniority with each successive FDC. Because the Arbitration Council considers the content of any valid CBA when crafting an award in response to a labor dispute, the inclusion of seniority-accrual provisions in CBAs could provide an important tool to guide AC decisions in disputes over the seniority of FDC workers from factories where such CBAs are in place.

Under Cambodian law, factory management may negotiate CBAs only with unions that have been certified with Most Representative Status (“MRS”).¹⁹⁸ To obtain MRS under the Labor Law, a union must show that: (1) its membership represents at least 51% of the factory’s workforce; and (2) it collects dues from at least 33% of its members.¹⁹⁹ Because FDCs discourage workers from joining unions, their increased use serves to directly limit the ability of unions to engage in collective bargaining. If unions are unable to recruit a sufficient number of workers to pass the 51% membership threshold, they fail to attain MRS and are unable to negotiate CBAs. Without a union to bargain with the management, workers cannot effectively exercise their right to freedom of association; thus, the widespread use of FDCs effectively diminishes workers’ freedom of association.

D. FDCs Make Workers More Vulnerable to Exploitation

One of the primary results of the widespread use of FDCs has been increased worker vulnerability. As noted earlier in Subsection IV.A.3, in order to terminate a UDC, an employer must provide proper grounds for termination. In contrast, when an FDC is not renewed, the employer does not have to provide any reason at all for non-renewal.²⁰⁰ Workers are more vulnerable under FDCs because FDCs shift the balance of power completely in the employer’s favor: The decision to renew a worker’s contract rests entirely in the employer’s hands. The Clinic interviewed many workers who expressed fears that they would arbitrarily not be renewed or that their employers would retaliate against them should they voice complaints about work conditions.²⁰¹

¹⁹⁸ Cambodia Labor Law, art. 277; see also Prakas No. 305, *The Representativeness of Professional Organizations of Workers at the Enterprise or Establishment Level and the Right to Collective Bargaining for the Conclusion of Collective Agreements at that Level*, art. 6 (Nov. 11, 2001).

¹⁹⁹ Cambodia Labor Law, art. 277.

²⁰⁰ Article 73 of the Cambodia Labor Law, which does not require an employer to provide a reason for not renewing an FDC; see also Lowenstein Clinic Interview with a C.CAWDU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

²⁰¹ See, for example, Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloom-time Factory Worker #2, Phnom Penh, Cambodia, Mar. 20, 2009.

Because FDC workers fear non-renewal, they feel that if they speak out when their rights have been violated, they will lose their jobs.

As one worker told the Clinic, continued employment under FDCs is entirely at the will of the employer—the employer has complete discretion whether to renew a worker’s contract.²⁰²

Knowing that such discretion is in their hands, employers use the threat of non-renewal against workers to induce fear. This threat is typically effective because workers know that it can be difficult to find a new job and that they may spend several months or more unemployed and without income if they are not able to renew their FDCs.²⁰³ Many workers told the

Clinic that they work under constant pressure, fearful that their contracts will not be renewed.²⁰⁴ Because FDC workers fear non-renewal, they feel that if they speak out when their rights have been violated, they will lose their jobs.²⁰⁵ Many reported that when they or fellow workers fell out of favor with management, they faced a serious threat of non-renewal. One worker told the Clinic that she had worked at a factory continuously for one year, and only when she complained of supervisor misconduct was she told that her contract would not be renewed.²⁰⁶

²⁰² Lowenstein Clinic Interview with New Wide Factory Worker #12, Phnom Penh, Cambodia, Mar. 17, 2009.

²⁰³ Lowenstein Clinic Interview with a C.CAWDU union leader, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

²⁰⁴ Lowenstein Clinic Interview with Top One Factory Worker #4, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #3, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Sunworld Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #2, Phnom Penh, Cambodia, Mar. 20, 2009.

²⁰⁵ Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Gladpeer Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #1, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #2, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Sunworld Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with PCCS Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

²⁰⁶ Lowenstein Clinic Interview with Makaloat II Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

The use of FDCs makes workers, even when they have not personally been threatened with non-renewal, experience greater anxiety about job security than workers who have the relative security of UDCs. Workers fear nonrenewal for even minor activities. Workers told the Clinic that talking to other workers in their production lines, showing up for work even five minutes late, or exercising the legal right not to work overtime could lead to their contracts not being renewed.²⁰⁷ Even if a factory is not likely to refuse to renew a worker's contract for being a few minutes late to work one morning, the fear of non-renewal for minor problems reflects the powerful psychological pressure to please management that FDC workers feel. Such pressure often causes workers to suppress legitimate complaints.

The issue of forced overtime demonstrates that the psychological pressure to stay in good favor with management has a direct effect on workers' enjoyment of their rights. Even though Ministry of Labor Notification No. 017 requires all overtime work to be voluntary, many workers told the Clinic that overtime was mandatory for FDC workers. One worker, who was also a union leader in her factory, told the Clinic that if FDC workers refuse to work overtime, they receive a written warning. One warning, she said, does not result in non-renewal, but if a worker receives more than one, her contract will probably not be renewed.²⁰⁸ At some factories, supervisors explicitly tell workers that the FDC workers have to accept all overtime requests or their contracts will not be renewed.²⁰⁹ At other factories, it is merely an unspoken policy.²¹⁰ Workers' anecdotes illustrate a clear discrepancy in the treatment of FDC workers and UDC workers: Factory management often requires overtime for FDC workers, while UDC workers are able to exercise their right to refuse overtime.²¹¹ A worker told the Clinic that when managers

²⁰⁷ See, for example, Lowenstein Clinic Interview with Bloomtime Factory Worker #3, Phnom Penh, Cambodia, Mar. 20, 2009.

²⁰⁸ Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; see also Lowenstein Clinic Interview with Pak Shun Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #2, Phnom Penh, Cambodia, Mar. 17, 2009.

²⁰⁹ For examples of explicit practices of forcing employees on FDCs to work overtime, see Lowenstein Clinic Interview with New Wide Factor Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with E Garment Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009.

²¹⁰ For examples of unspoken policies of forced overtime for workers on FDCs, see Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #6, Phnom Penh, Cambodia, Mar. 18, 2009.

²¹¹ Lowenstein Clinic Interview with E Garment Factory Worker #1, Phnom Penh, Cambodia,

at her factory need workers to work overtime, they announce: “If you are on an FDC, then you must work overtime, but if you are on a UDC, then you can volunteer.”²¹² Her account demonstrates that management distinguishes between UDC and FDC workers in requiring overtime.

Management can punish workers in other ways for exercising their right not to work overtime. One worker said that to punish FDC workers who exercise their right to decline overtime, the management in her factory disallows overtime for them for the entire month after their refusal.²¹³ Overtime provides much-needed supplementary income for most workers, so depriving workers of the ability to choose to work overtime for an entire month significantly diminishes their ability to meet their financial needs.

E. Employers Are Using FDCs to Deny Workers Benefits

As discussed in the legal analysis above, one of the main problems with FDCs is that workers are entitled to some benefits only after working continuously for a certain period of time. By putting workers on FDCs and calculating their duration of service in a way that systematically excludes them from benefits linked to “continuous service,” factories can exploit continuous-service requirements to reduce production costs.²¹⁴ One union leader estimated that the savings from the reduced benefits that factories pay out on FDCs amount to US\$20-30 per year on each contract converted from a UDC to an FDC.²¹⁵ Depending on how many workers are employed, factories can potentially save thousands of dollars by converting all UDC workers to FDCs and cutting continuous-service-linked benefits.

Mar. 17, 2009; Lowenstein Clinic Interview with Top One Factory Worker #3, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #6, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

²¹² Lowenstein Clinic Interview with E Garment Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009.

²¹³ Lowenstein Clinic Interview with Gladpeer Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; see also Lowenstein Clinic Interview with Pak Shun Factory Worker #3, Phnom Penh, Cambodia, Mar. 19, 2009.

²¹⁴ Article 166 of the Labor Law provides that an employee has met the “continuous service” requirement if she has worked “an average of 21 days per month,” and it is part of the Arbitration Council’s “established jurisprudence” that this applies to any worker who has worked 21 days for two consecutive months. 57/06-Evergreen (citing 55/04-You Chheng, 69/04-Common Way, & 85/04-Kang Ning).

²¹⁵ Lowenstein Clinic Interview with a C.CAWDU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

Not all factories use FDCs to deprive workers of seniority or continuous-service-based benefits, but the Clinic's interviews with factory workers indicate that many do. Some employers understand the nature of FDCs, with the payment of severance at the end of each contract, to result in a "clearing" of the employer-employee relationship. Under this "clearing" approach, even workers whose FDCs are immediately renewed are considered new workers and accrue no seniority from or record of prior service. This makes it impossible for FDC workers to accumulate the seniority or "continuous" service to be eligible for the same benefits they would have under UDCs.²¹⁶

The impossibility of accumulating seniority under FDCs often affects the calculation and payment of attendance bonuses for FDC workers. According to Ministry of Labor Notification No. 017, employers must provide workers with a monthly US\$2 seniority bonus after they have worked for one year, with an additional US\$1 added for each additional year of seniority. All qualifying workers, even those employed under FDCs, are supposed to receive this seniority bonus. Many factories, however, employ workers on FDCs with durations of less than one year, which allows them to claim that their workers never meet the minimum service requirement to be eligible for seniority bonuses.²¹⁷ Even if a worker has been employed, for example, on several successive FDCs just short of one year each, the employer may claim that the relationship is "cleared" between each FDC. Consequently, the employee never receives the initial US\$2 seniority bonus and never begins to accrue seniority.

Factories employ other tactics to deprive workers of their benefits. Some factories recognize that back-to-back FDCs constitute de facto continuous service, but they are able to avoid paying seniority bonuses by requiring FDC workers to take short periods of leave between FDCs. This allows factories to claim that their employees' work was, in fact, discontinuous.²¹⁸ One worker told the Clinic that she and other workers at her factory are hired on 25-day FDCs. At the end of each FDC, they take leave for anywhere between three and seven days and then return to the factory on new 25-day FDCs.²¹⁹ The factory uses this tactic to claim that a worker's service is not continuous for the purpose of calculating benefits. Interviews with workers, union

²¹⁶ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009.

²¹⁷ Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009.

²¹⁸ Lowenstein Clinic Interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

²¹⁹ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009.

members, Cambodian non-profit organizations, and the ILO indicate that the benefits that are being denied to FDC workers include maternity leave, sick leave, special leave, annual leave, seniority bonuses, and attendance bonuses.

1. Denial of Maternity Leave

According to interviews with factory workers, many women who have worked for more than one year on an FDC are being denied the maternity leave benefits to which they are entitled under Articles 182 and 183 of the Labor Law, as well as Article 46 of the Constitution. As noted earlier in this report, 85 to 90% of garment workers are young women aged 18 to 25.²²⁰ Thus, the denial of maternity leave has the potential to affect the health and safety of the vast majority of Cambodian garment workers. Workers reported having to work under dangerous conditions while pregnant or being forced to choose between having a family and keeping their factory jobs.²²¹

Some factories provide UDC workers with maternity leave while denying it to FDC workers.²²² In these instances, management eventually forces pregnant FDC workers to resign when they can no longer perform the tasks assigned to them or they leave on their own to give birth. In other instances, factories simply do not renew the FDCs of workers who become pregnant, thereby avoiding the obligation to pay maternity-leave benefits.²²³ One worker said that she was on a three-month FDC at a factory when she became pregnant. Factory managers told her that, because she was pregnant, they would not renew her contract; according to her, UDC workers were

The benefits that are being denied to FDC workers include maternity leave, sick leave, special leave, annual leave, seniority bonuses, and attendance bonuses.

²²⁰ Better Factories Cambodia, *Facts and Figures about Cambodia's Garment Industry* (2005), available at <http://www.betterfactories.org/ILO/aboutIndustry.aspx?z=3&c=1>.

²²¹ Lowenstein Clinic Interview with Top One Factory Worker #3, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Makaloat II Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory #1, Phnom Penh, Cambodia, Mar. 19, 2009.

²²² Lowenstein Clinic Interview with Top One Factory Worker #7, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009.

²²³ Lowenstein Clinic Interview with Gold Kamvimex Factory #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

allowed to take paid maternity leave even though she was not.²²⁴ The worker then found a job at a different factory. When management at the new factory found out she was pregnant, they did not stop her from working. However, the new factory demanded a great deal of mandatory overtime, which is prohibited by the Labor Law. The mandatory overtime eventually drove her to quit.²²⁵

Denial of maternity-leave benefits constitutes both pregnancy- and sex-based discrimination and violates protections for women included in both the Constitution and the Labor Law. The right to equal treatment at work is protected by international human and labor rights standards, including the ICCPR, ICESCR, and ILO Convention 111 (Discrimination in Employment and Occupation), all of which Cambodia has ratified. Convention 111 specifically prohibits “any distinction” on the basis of sex that “has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”²²⁶ Denial of maternity leave for pregnant women impairs women’s equal right to work and, therefore, constitutes a violation of both Cambodian and international law.

2. Denial of Sick Leave

Many workers reported that factory management either denied them sick leave or told them, after they took sick leave once, that if they took it again, their FDCs would not be renewed. Article 71 of the Labor Law guarantees all workers sick leave; it provides that workers may suspend their contracts for reason of illness if a qualified doctor certifies their condition.²²⁷ Employers use a number of tactics to discourage workers from taking sick leave, including not renewing a worker’s FDC if she asks for sick leave too often.²²⁸ One worker stated that she applied for sick leave only once, and after that, her contract was not renewed.²²⁹

²²⁴ Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

²²⁵ Ibid.

²²⁶ ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, 1958, art. 1(1)(a).

²²⁷ Cambodian Labor Law, art. 71, para. 3

²²⁸ Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with MSI Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Pak Shun Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009.

²²⁹ Lowenstein Clinic Interview with Pak Shun Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

Many workers said that if they receive sick leave, management deducts it from their pay.²³⁰ Although the Labor Law does not explicitly require that employers pay regular wages to employees taking sick leave, the internal work rules of many factories provide for continued compensation for employees certified by a doctor for sick leave (often calculated as a percentage of their base salary that decreases according to the employee's length of absence). Moreover, the Arbitration Council has stated that, "in practice," a Labor Inspector²³¹ uses his power to validate or invalidate the internal work rules of a factory to ensure that workers have some wage protection while taking sick leave.²³² Indeed, the inclusion of wage protection for sick workers in factories' internal work rules has become such standard practice in Cambodia that, in a June 2007 dispute at the Chung Fai factory that was brought before the Arbitration Council, workers and factory management agreed that it was the "current practice in Cambodia that the employer retains attendance bonus and wages for workers when they take sick leave."²³³

The Clinic's analysis reveals that workers on FDCs are more likely to be denied sick leave or to be intimidated into working through illness for fear of non-renewal than workers who enjoy the job security of UDCs. Moreover, when FDC workers do take sick leave, factories subject them to wage penalties that are out of step with standard industry practice. Thus, FDCs leave workers more vulnerable to exploitation and less able to enforce their rights.

3. Denial of Special Leave and Annual Leave

Many workers also reported being denied "special leave," which, under Article 171 of the Labor Law, they are allowed to take in the event of a personal or family emergency, and paid annual leave, which they are allowed under Article 167. The tactics employers use to deprive workers of special and annual leave are similar to the ones they use to deny sick leave: Employ-

²³⁰ Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Gladpeer Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Sunworld Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with PCCS Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009.

²³¹ Labor Inspectors are employees of the Ministry of Labor, tasked with supervising aspects of labor relations and practices.

²³² See AA 26/03-Cambodia Sport Wear.

²³³ AA 47/07-Chung Fai. The only dispute was whether the worker's illness had to be certified by a Labor Doctor, specifically, or whether any state-certified doctor's assessment would suffice.

ers threaten not to renew workers' contracts if they take the leave to which they are entitled by law.²³⁴ The Labor Law guarantees a worker both special leave and paid annual leave after she has completed one year of continuous service for an employer. Evidence gathered by the Clinic suggests that factories sometimes flatly deny FDC workers these benefits, despite a year or more of continuous work.²³⁵ In other cases, factories denied workers benefits because, despite having worked for more than one year in a factory, their employers forced them to take time off between successive FDCs and then claimed that their service to the factory had not been continuous.²³⁶ Denial of special and annual leave is yet another way in which employers use FDCs to cut costs and deprive workers of their rights.

4. Denial of Seniority Bonuses

Some workers also reported that factories denied the seniority bonuses due to them even though they had met the continuous-service requirement. Denial of seniority bonuses appeared to be a particularly acute problem at the Bloomtime Factory. One Bloomtime worker told the Clinic that when she was on a UDC, she received a seniority bonus of US\$3 per month, but when Bloomtime converted its entire workforce to FDCs, it also eliminated seniority bonuses.²³⁷ Two Bloomtime workers told the Clinic that Bloomtime eliminated their US\$4 seniority bonuses after switching them from UDCs to FDCs, and another Bloomtime worker told the Clinic that she lost her US\$2 monthly seniority bonus when management converted her contract to an FDC.²³⁸

²³⁴ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009.

²³⁵ Lowenstein Clinic Interview with Top One Factory Worker #2, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009.

²³⁶ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009.

²³⁷ Lowenstein Clinic Interview with Bloomtime Factory Worker #4, Phnom Penh, Cambodia, Mar. 20, 2009.

²³⁸ Lowenstein Clinic Interview with Bloomtime Factory Worker #6, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #7, Phnom Penh, Cambodia, Mar. 20, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #8, Phnom Penh, Cambodia, Mar. 20, 2009; see also Lowenstein Clinic Interview with representatives from the CLEC, Phnom Penh, Cambodia, Mar. 16, 2009 (stating that it is easy for employers to hire workers for less than one year to avoid paying the seniority bonus and that employers sometimes terminate older contracts to avoid paying seniority bonuses).

5. Denial of Attendance Bonuses

Some FDC workers reported that factories are denying them the US\$5-per-month attendance bonuses that Ministry of Labor Notification No. 017 guarantees to employees who attend work “regularly on the full number of days which must be worked in a month.”²³⁹ Employees must work a total of 26 days in a month to be eligible for the attendance bonus. Some workers reported working more than 26 days in a row and still being denied attendance bonuses, because they were on FDCs. One worker told the Clinic that she sometimes worked between 26 and 29 days in a month, but regardless of how many days she worked, she never received an attendance bonus. Her manager told her that employers could exercise discretion over whether to pay her attendance bonus, because her work was “temporary.”²⁴⁰ The Clinic also heard of cases in which factories hired FDC workers on successive 25-day FDCs but required them to take a few days off in between each FDC so that the employers could avoid paying the attendance bonuses due to workers who work 26 days in a month.²⁴¹

6. Denial of Protections Specific to FDCs

Factories often deny FDC workers even the rights that attach specifically to FDCs. First, many factories calculate FDC worker salaries improperly and do not increase them with seniority as they should. Workers noted that, while the salaries of UDC workers generally increase over time as they accumulate seniority, FDC workers do not enjoy the same salary increases as UDC workers.²⁴² In a particularly egregious example of wage miscalculation, one worker said that her factory’s management is paying her wage based on the number of calendar days worked per month, as opposed to a flat monthly wage for working the full number of business days per month as required by law.²⁴³ In other words, if she works 29 days in a 30-day month, management decreases her monthly wage for the one day she had off. Second, some fac-

²³⁹ Notification No. 017, at p.3.

²⁴⁰ Lowenstein Clinic Interview with E Garment Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009.

²⁴¹ Lowenstein Clinic Interview with Top One Factory Worker #1, Phnom Penh, Cambodia, Mar. 18, 2009 (describing how she was asked to take several days off between 25-day contracts); Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009 (stating she is employed on 25-day contracts).

²⁴² Lowenstein Clinic Interview with Gladpeer Factory Worker #3, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #1, Phnom Penh, Cambodia, Mar. 20, 2009.

²⁴³ Lowenstein Clinic Interview with Top One Factory Worker #7, Phnom Penh, Cambodia, Mar. 18, 2009.

tories are not converting FDC workers' contracts into UDCs even when they have worked longer than the maximum two years of FDC work the law permits.²⁴⁴ Third, factories are sometimes not paying FDC workers the 5% severance payment to which they are entitled at the end of each FDC. Several of the workers and union representatives interviewed by the Clinic mentioned that employers simply renew FDCs without paying the 5% severance.²⁴⁵ The need for FDC workers to sometimes accept the denial of explicit contractual protections reflects the precariousness of their status.

²⁴⁴ Lowenstein Clinic Interview with Sinomax Factory Worker #1, Phnom Penh, Cambodia, Mar. 17, 2009; Lowenstein Clinic Interview with Gold Kamvimex Factory Worker #1, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Bloomtime Factory Worker #4, Phnom Penh, Cambodia, Mar. 20, 2009.

²⁴⁵ Lowenstein Clinic Interview with Gladpeer Factory Worker #2, Phnom Penh, Cambodia, Mar. 19, 2009; Lowenstein Clinic Interview with Top One Factory Worker #5, Phnom Penh, Cambodia, Mar. 18, 2009; Lowenstein Clinic interview with a CFITU union leader, Phnom Penh, Cambodia, Mar. 18, 2009.

VII. Conclusion

The Lowenstein Clinic's research makes clear that the widespread use of FDCs leads to increased worker vulnerability, decreased protection for freedom of association, and multiple violations of domestic and international law.

First, although workers may, in some instances, find the 5% severance pay attached to FDCs attractive, it is clear that the mass conversion of UDCs to FDCs is not the result of voluntary and informed decisions made by workers, but a top-down decision imposed by employers, often through coercion, manipulation, or deceit. Many factories rely on corrupt unions and factory shutdowns that violate the Labor Law to convert their entire permanent workforces from long-term employment under UDCs to short-term employment under FDCs.

Second, the use of FDCs clearly facilitates employers' anti-union discrimination and suppression of free association. Employers effect these results through generally decreased job security and worker intimidation, preying on the workers' fears that their FDCs will not be renewed. In many instances, factory management retaliates specifically against union leaders. Discrimination against union members is a direct violation of the right to freedom of association, guaranteed under Articles 37 and 42 of the Cambodian Constitution and international standards embodied in the ICESCR, the ICCPR, and ILO Conventions 87 and 98.

Third, the widespread use of FDCs contributes to the suppression of union activity, which, in turn, harms workers' rights in a number of ways. Suppression of union activity reduces the workers' ability to bring complaints both informally to factory management and formally through the Arbitration Council. It also impairs workers' ability to negotiate collective bargaining agreements with factories, which is the most effective way to protect workers' rights.

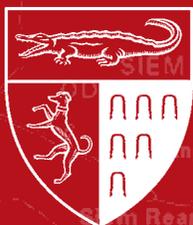
Fourth, the use of FDCs has made garment workers generally more vulnerable to exploitation by their employers. For example, the use of FDCs enables factories to force employees to work overtime, even though all overtime work must be voluntary.²⁴⁶

Finally, factories are using FDCs to deny workers many benefits to which they are entitled under Cambodian labor law. Most egregious is the denial of maternity leave, which effectively amounts to pregnancy- and gender-based discrimination against women. This practice violates Articles 182

²⁴⁶ Article 4 of Prakas No. 80 MoSALVY, dated March 1, 1999.

and 183 of the Labor Law, as well as international labor standards embodied in ILO Convention 111. Other benefits that the use of FDCs denies include sick leave, special leave, annual leave, seniority bonuses, attendance bonuses, increased wages based on seniority, the conversion of an FDC to a UDC after two years of service, and the 5% severance payment required at the end of an FDC. The denial of these benefits violates many provisions of Cambodian labor law and cheats thousands of workers out of US\$20-30 per year each in benefits, substantially decreasing the amount of money workers earn and the quality of workers' lives.

The Cambodian garment industry is at a critical crossroads. Cambodia can either reinforce its reputation as a country committed to improving workers' rights or implement Labor Law reforms that will damage both workers' rights and the Cambodian garment industry's reputation, as well as jeopardize industrial peace within the garment sector.



Allard K. Lowenstein International Human Rights Clinic

Yale Law School

The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School clinic that has three main goals: to provide students with the opportunity to gain practical experience that reflects the range of activities in which lawyers engage to promote respect for human rights; to help students build the basic knowledge and skills necessary to be effective human rights lawyers and advocates; and to contribute to current efforts to protect human rights through valuable, high-quality assistance to appropriate organizations and individual clients. Recent work has included involvement in human rights litigation in U.S. courts, preparing amicus briefs on international and comparative law for U.S., foreign, and international forums, advocacy before international and regional human rights bodies, and investigating and drafting reports on human rights situations.

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